TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 227.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY C. SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED JANUARY 15, 1898.

(16,778.)

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1 (*Petition for Certiorari.*)

STATE OF MICHIGAN:

To the justices of the supreme court:

Your petitioner, The Lake Shore and Michigan Southern Railway Company, a corporation, respectfully represents that heretofore, to wit, on the 20th day of October, 1893, Henry C. Smith, as petitioner and relator, filed in the circuit court for the county of Lenawee, in the State of Michigan, a petition, duly verified, which petition, among other things, alleged that under subdivision 9 of section 9 of article 2 of the General Railroad Laws of the State of Michigan, as amended by act No. 90 of the public acts of 1891, it became and was the duty of said railway company to keep for sale at its ticket office, in the city of Adrian, in said county of Lenawee, one-thousand mile tickets, at a price not to exceed twenty dollars, and required by the purchaser to issue such tickets in the name of the purchaser and his wife, designating the name of each on the ticket, subject to the limitations and conditions in said act mentioned, which tickets should be valid for two years after the date of purchase.

And the said petition further alleged that on the 19th day of April, 1893, and also on the 17th day of October, 1893, said Henry C. Smith, petitioner as aforesaid, tendered to the agent of said company in charge of its ticket office, in the said city of Adrian, the sum of twenty dollars, and demanded that said agent issue to him, said petitioner, a one-thousand-mile ticket, in the name of himself and his wife, Emma Watts Smith, as provided by the said statute; but that said agent, on both of said occasions, refused to sell to or issue to said Henry C. Smith such ticket in the name of himself and of his wife.

And the said petitioner therefore prayed that a mandamus issue, directed to said railway company, commanding it to issue or cause to be issued to him, the said petitioner, Henry C. Smith, on payment or tender of said sum of twenty dollars, such one-thousand-mile ticket, in the name of himself and his said wife, as re-
2 quired by the said statute. A duly authenticated copy of which petition is hereto annexed, marked "Exhibit A," and is made a part of this petition.

And your petitioner further shows that thereupon, to wit, on the said 20th day of October, 1893, the Honorable Victor H. Lane, circuit judge, then presiding, made an *ex parte* order that the said Lake Shore and Michigan Southern Railway Company issue to said Henry C. Smith and his wife, Emma Watts Smith, upon payment or tender to it or to its ticket agent in charge of its ticket office at Adrian, Michigan, of twenty dollars, a one-thousand mile ticket, valid for two years, in the name of said petitioner and his said wife, and that the same be issued on or before October 30th, 1893, or show cause on said date at the opening of court why it should not, and that a

copy of the order and that the petition be served upon the respondent, the said Lake Shore and Michigan Southern Railway Company, at least four days before said October 30th, as will more fully appear by the duly authenticated copy of said order hereto annexed and marked "Exhibit B" and made a part of this petition.

And your petitioner further shows that by consent of the parties the answer and return of respondent, The Lake Shore and Michigan Southern Railway Company, was not made and filed until the 20th day of November, 1893; that upon said 20th day of November, 1893, the respondent in said cause, said Lake Shore and Michigan Southern Railway Company, made answer and return to said order so as aforesaid made by the said circuit judge on the said 20th day of October, 1893, a duly authenticated copy of which answer and return is hereto annexed, marked "Exhibit C," and made a part of this petition; and thereafter, on the 27th day of November, 1893, the said relator filed in said cause a disclaimer or statement that he only asked that respondent be required to comply with the said statute in the lower peninsula of the State of Michigan, and not in any other State or Territory, copy of which disclaimer is hereto attached, marked "Exhibit D," and made a part of this petition.

3 And your petitioner further shows that the hearing of said petition was by consent of parties adjourned from time to time and the hearing thereon had before the said circuit judge on the 16th day of November, 1895, when the matter was submitted to said circuit judge, and on the 4th day of April, 1896, said circuit judge announced his decision and made an order therein that a writ of mandamus issue, directed to said respondent, the said Lake Shore and Michigan Southern Railway Company, commanding it to issue to said relator, said Henry C. Smith, upon payment or tender to it or to its ticket agent in charge of its ticket office at Adrian, Michigan, twenty dollars, lawful money of the United States, a thousand-mile ticket in the name of said Henry C. Smith and his said wife, Emma Watts Smith, as required by the act of the legislature of the State of Michigan mentioned in the petition, subdivision 9, section 9, article 2, chapter 91, of Howell's Annotated Statutes, as amended by act No. 90 of the public acts of 1891; that said ticket should be good upon and limited to the railway lines operated by the said respondent in the State of Michigan; a duly authenticated copy of which order is hereto annexed, marked "Exhibit D," and made a part of this petition.

And in the said order is also embraced the following:

"And it is further certified that upon the argument of said cause the question of a demand upon respondent by relator for a ticket limited to its lines within the State of Michigan was expressly waived by counsel for respondent, and it was agreed that the cause should proceed the same as if such demand had been made and refused."

And your petitioner avers that this latter certification is made under a misapprehension or mistake.

The waiver did not involve the question of a demand limited to the State of Michigan.

The waiver made by counsel for respondent upon the argument was as to the matter stated in the eighth paragraph of the answer and returned of respondent (Exhibit C); which eighth para-
4 graph is as follows:

"8. This respondent alleges that at no time since the making of the order to show cause herein down to the 13th day of November, 1893, has the petitioner, Henry C. Smith, or any person on his behalf, paid or tendered to said respondent's ticket agent in charge of its ticket office at Adrian, Michigan, twenty dollars or any other sum, nor has said Smith or any person upon his behalf requested this respondent to issue to him a thousand-mile ticket in accordance with the terms of said order."

It appears by the return of respondent to relator's petition that your petitioner owns and operates a line of railway from the city of Buffalo, in the State of New York, to the city of Chicago, in the State of Illinois, passing through the States of New York, Pennsylvania, Ohio, Indiana, and Illinois, and also a line of road that extends from Elkhart, in the State of Indiana, where it connects with said road between Buffalo and Chicago, to the city of Monroe, in the State of Michigan, with a branch line from Lenawee Junction, a station on said line, in the county of Lenawee and State of Michigan, to the city of Jackson, in the county of Jackson and State of Michigan; that said city of Adrian in said petition and answer named is a station on said line of road in said Lenawee county; that the most westerly station in the State of Michigan on said line of railroad is White Pigeon, and the said line of road crosses the State line between Indiana and Michigan 4.02 miles westerly from said station of White Pigeon.

And your petitioner further shows and alleges, and as is more fully stated in said answer and return, that all of said railroad line owned by your petitioner, including said Jackson branch, which is situated in the State of Michigan, was formerly the railroad belonging to the Michigan Southern Railroad Company, a corporation organized and existing under and by virtue of a special charter granted to said corporation by the State of Michigan by act No. 113 of the Session Laws of the State of Michigan for the Year 1846, approved May 9th, 1846.

5 And your petitioner further alleges, as it did in said answer and return, that it has succeeded to all the rights, franchises, and powers of said Michigan Southern Railroad Company under said charter.

And your petitioner further shows and alleges that under and by virtue of the terms and conditions of said charter the Michigan Southern Railroad Company had the power and authority to fix and charge, and did fix and charge, the sum of three cents per mile for transportation of passengers over its road, and the same right to charge three cents per mile has ever since been maintained and paid over the line of railroad authorized to be constructed by said charter.

And your petitioner alleges, as in said answer and return, that it has had and still has the power and authority to make such charge,

and that the provisions of said charter are now in full force and effect and apply to your petitioner and to that portion of its railroad so formerly held and owned by said Michigan Southern Railroad Company.

Your petitioner, the respondent in said proceedings named, alleges that the said order and direction of said circuit judge so made on the 4th day of April, 1896, that a writ of mandamus issue, as in said order directed, was and is unauthorized, and that the said court erred in making said order and in directing the issue of a writ of mandamus, for the following reasons:

1. The statute upon which the relator bases his right is too vague and indefinite to permit of enforcement by writ of mandamus.

2. It in general terms requires all railroad companies owning and operating railroads in the State of Michigan or partly in the State to keep on sale and sell one-thousand-mile tickets.

3. It does not declare or define what a one-thousand-mile ticket is or shall be.

4. The statute provides no means whereby the conductor of a train can identify the parties offering the ticket for passage
6 as the persons entitled to ride upon it.

5. It appearing by the petition and answer of respondent that the lines of road that respondent operates are partly within and partly without the State, the greater share of respondent's mileage being without the State of Michigan, the statute, if it applies or is intended to apply to transportation over respondent's road outside the State of Michigan, is unconstitutional and invalid under the Constitution of the United States, article 1, section 8, as an interference with interstate commerce.

6. It appears from the petition that the demand of relator for such one-thousand-mile ticket was intended and understood to be a demand for a ticket good anywhere on the lines of road operated by respondent, as well without as within the State of Michigan.

7. The act in question is an attempt on the part of the legislature to compel railroad companies to enter into express contracts to be performed in the future at any time within two years, at the option of the other party to the contract, and is therefore unconstitutional and invalid.

8. The act is so indefinite, uncertain, and imperfect in its terms and conditions that it is ineffectual and inoperative and its enforcement impracticable.

9. The use to which the ticket may be put is not stated, whether it shall be used for continuous journeys or with stop-over privileges.

10. The act requires all railroad companies in the State to keep for sale thousand-mile tickets, but whether they shall be good on all roads or upon some or any it does not define.

11. The act does not define whether all companies shall keep for sale such tickets for each and every road or only for its own road.

12. The statute does not define the rights or duties of the company or passenger under such mileage tickets.

13. The statute does not define whether such tickets shall be received on all or only on some passenger trains.

7 14. The statute does not define whether or not such tickets shall be received in payment of fare on what are known as "limited" trains and on such trains as, according to the rules and usages of railroad companies, mileage books are not received as fare.

15. The statute does not define whether or not trains shall be stopped at any station where a ticket-holder may desire to stop, though the train may be scheduled to not stop at that station.

16. There is no provision in the statute requiring any railroad company to accept or receive upon its passenger trains such mileage tickets.

17. The act in question is in violation of the provision of article 14 of the amendment to the Constitution of the United States, that no person shall be deprived of property without due process of law.

18. The act attempts to compel railroad companies to agree to part with their property, to wit, transportation, at a fixed rate at a date in the future when such fixed rate may be wholly unremunerative and at a time when a greater rate may be authorized and allowed by law.

19. The statute in question is void and not within the constitutional power of the legislature.

20. The statute in question is in violation of that provision of the constitution of the State of Michigan that gives to the legislature power to from time to time "establish reasonable maximum rates for the transportation of passengers and freight on the different railroads in this State."

21. That the relator filed a disclaimer as to his right to such a ticket good outside the lower peninsula, in the State of Michigan, does not entitled him to a ticket good in the lower peninsula, even if otherwise entitled thereto. If his petition is too broad and asks more than he is entitled to he cannot so amend it.

22. The court erred in directing a mandamus to issue for a ticket differing from that asked for by the petition and designated in the order to show cause.

23. The act in question does not apply to your petitioner, 8 The Lake Shore and Michigan Southern Railway Company. It applies only to such corporations as are organized under the general railroad laws of the State.

24. Your petitioner herein owns and operates its line of road through Adrian, where relator resides and where demand was made for such ticket by relator, and its line of road from Monroe to Elkhart and from Lenawee Junction to Jackson, under the special charter granted by the legislature of the State of Michigan to the Michigan Southern Railroad Company to all the rights and privileges *of* which your petitioner has succeeded, including the right to charge three cents per mile for passenger transportation.

25. This special charter was and is in the nature of a contract between the State and the Michigan Southern Railroad Company, and now between the State and your petitioner. It was a bargain and sale of the road belonging to the State to the Michigan Southern Railroad Company for a consideration paid.

26. It is not within the power of the legislature to change the

terms and conditions of the said charter and contract other than in the manner in said charter provided.

27. Nor is it within the power of the legislature to reduce the rate of fare that respondent may charge below three cents per mile.

Wherefore your petitioner prays that a writ of certiorari may be issued out of and under the seal of the supreme court of the State of Michigan to review said proceedings before the said circuit judge in said circuit court for the county of Lenawee, and that the said order directing a mandamus to issue be set aside, and that a writ of mandamus as prayed for by the relator be denied.

And your petitioner prays that the same be made a calendar cause.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
By C. E. WEAVER, *Its Agent and Attorney.*

9 ASHLEY POND,
A. C. ANGELL AND
C. E. WEAVER,
Attorneys for Petitioner.
GEO. C. GREENE, *Of Counsel.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Lenawee.

HENRY C. SMITH, Petitioner and Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

LENAWEE COUNTY, *ss:*

Clement E. Weaver, being duly sworn, deposes and says that he resides in the city of Adrian, in said county of Lenawee, and that he is now and for several years last past has been the agent and attorney of The Lake Shore and Michigan Southern Railway Company, the respondent in the above-entitled cause; that he is the agent and attorney of said respondent in this cause, and makes this affidavit and verification of the foregoing petition of respondent for a writ of certiorari on this cause for and in behalf of said petitioner, which petition is made a part of this affidavit; that he has full and particular knowledge of all the matters stated in the foregoing petition; that he has read the foregoing petition; that he knows the contents of said petition, and that the same is true of his own knowledge as therein stated except as to those matters therein stated to be
10 upon information and belief, and as to those matters he believes it to be true.

CLEMENT E. WEAVER.

Sworn to and subscribed before me this 2nd day of May, 1896.
D. B. MORGAN,
Notary Public in and for Lenawee County.

11 "EXHIBIT A."

STATE OF MICHIGAN:

To the circuit court for the county of Lenawee:

The petition of Henry C. Smith, of the city of Adrian, county of Lenawee, State of Michigan, shows:

1. That the Lake Shore and Michigan Southern Railway Company is and was on, to wit, the 19th day of April last, and for a long time prior thereto has been, a private corporation duly organized and doing business under the laws of the State of Michigan, partly in this State and partly in the States of New York, Ohio, Indiana, and Illinois, and as such operating a railroad in said States, except the upper peninsula of the State of Michigan, for the transportation and carriage of persons and freight, and that one of the principal ticket offices of said railway company upon its line of roads is at the said city of Adrian.

2. That under subdivision 9 of section 9 of article II of the general railroad laws of this State, as amended by act No. 90 of the public acts of 1891, it became and was the duty of the said railway company to keep for sale at its ticket office in said city of Adrian one-thousand-mile tickets at a price not to exceed twenty dollars, and it also became and was the duty of said company, if required by the purchaser, to issue such tickets in the name of such purchaser and his wife, designating the name of each on such tickets, subject to the limitations and conditions in said act mentioned, which tickets shall be valid for two years after date of purchase.

3. That for several years said railroad company has kept and now keeps for sale at its said office in said city of Adrian one thousand-mile tickets at the price of $20.00, but said tickets when issued by it were and are made non-transferrable and subject to certain conditions endorsed thereon, No. 1 of which is as follows: That it shall be good only for and when properly signed by the person in whose name it is issued, and it shall be taken up and forfeited if
12 presented by any other person; not transferable. And No. 8 is as follows: Passage shall not be claimed after the expiration of the limit of this contract, not exceeding one year, as this ticket and contract shall be surrendered to the conductor when expired or when the last mile is taken.

4. That on, to wit, the 19th day of April last, and also on October 17th, 1893, your petitioner tendered to the agent of said railway company in charge of its ticket office at said city of Adrian the sum of twenty dollars and demanded that said agent issue to your petitioner a one-thousand-mile ticket in the name of your petitioner and of his wife, Emma Watts Smith, as provided by the above-mentioned statute; that said agent offered to sell your petitioner such one-thousand-mile ticket issued in his individual name and made non-transferable, but did refuse on both of said occasions and still does refuse to issue such ticket in the name of your petitioner and of his wife; further shows that many persons desire to pur-

chase similar tickets, and that said matter is of general importance to the public.

Therefore your petitioner prays that a mandamus do issue directed to said railway company, commanding it to issue or cause to be issued to your petitioner, on payment or tender of said sum of twenty dollars, such one-thousand-mile ticket in the name of your petitioner and of his said wife, as required by the act above mentioned.

HENRY C. SMITH.

WATTS, BEAN & SMITH,
Attorneys for Petitioner.

STATE OF MICHIGAN, } ss:
County of Lenawee, }

Henry C. Smith, being duly sworn, says that he has read the foregoing petition by him subscribed and knows its contents, and that the facts therein stated are true of his knowledge.

13 Subscribed and sworn to before me this 18th day of October, 1893.

CHANNING WHITNEY,
Notary Public.

STATE OF MICHIGAN, } ss:
County of Lenawee, }

I, Edwin L. Mills, clerk of the county of Lenawee and of the circuit court thereof, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of petition with the original as filed October 20th, 1893, now remaining in my office, and have found the said copy a correct transcript therefrom and of the whole thereof.

Seal Lenawee Circuit Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this second day of May, A. D. 1896.

EDWIN L. MILLS, *Clerk.*

14 "EXHIBIT B."

STATE OF MICHIGAN:

The Circuit Court for the County of Lenawee.

HENRY C. SMITH, Petitioner,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

At a session of said court held at the court-house, in the city of Adrian, in said county, on the 20th day of October, 1893.

Present: Hon. Victor H. Lane, circuit judge.

The matter of the petition of Henry C. Smith, asking that a mandamus issue against the Lake Shore and Michigan Southern Railway Company, as prayed in said petition, came on to be heard.

After hearing Watts, Bean & Smith, attorneys for petitioner, and reading the said petition on file, and being fully advised in the premises, it is ordered that the said respondent, The Lake Shore and Michigan Southern Railway Company, do issue to said Henry C. Smith and his wife, Emma Watts Smith, upon the payment or tender to it or to its ticket agent in charge of its ticket office at Adrian, Michigan, of twenty dollars, a one-thousand-mile ticket, valid for two years, in the name of said petitioner and his said wife, and that the same be issued on or before October 30th, 1893, or show cause on said date at the opening of said court why it should not.

And that a copy of this order and of said petition be served upon said respondent at least four days before said October 30th.

VICTOR H. LANE,
Circuit Judge.

15 STATE OF MICHIGAN, } ss:
County of Lenawee, }

I, Edwin L. Mills, clerk of the county of Lenawee and of the circuit court thereof, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of order with the original as made October 20th, 1893, now remaining in my office, and have found the said copy a correct transcript therefrom and of the whole thereof.

Seal Lenawee Circuit Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this second day of May, A. D. 1896.

EDWIN L. MILLS, *Clerk.*

16 "EXHIBIT C."

STATE OF MICHIGAN:

In the Circuit Court for the County of Lenawee.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

The answer and return of The Lake Shore and Michigan Southern Railway Company, respondent, to the order to show cause why it should not sell and issue to petitioner a one-thousand-mile passenger ticket, good for himself and wife and in the name of himself and wife, Emma Watts Smith, good for two years from the issue thereof.

Now comes the respondent, and for answer thereto says:

1. That this respondent, The Lake Shore and Michigan Southern Railway Company, is a railroad corporation owning and operating a railroad between Chicago, in the State of Illinois, and Buffalo, in the State of New York, which passes through and into the States of Illinois, Indiana, Ohio, Pennsylvania, and New York, and also a

line of railroad which extends from said first-mentioned railroad at Elkhart, in the State of Indiana, to Monroe, in the State of Michigan, with a branch line from Lenawee Junction, on said line, a station in the county of Lenawee, in the State of Michigan, to the city of Jackson, in the county of Jackson, in said State.

2. That the most westerly station in the State of Michigan on the said line of railroad extending from Elkhart to Monroe is White Pigeon; that said line of road extending from Monroe to Elkhart crosses the State line into Indiana about 4.02 miles westerly from the said station of White Pigeon.

3. That all of the said railroad line owned by this respondent, including said Jackson branch, which is situated in the State of Michigan as aforesaid, was formerly the railroad belonging
17 to the Michigan Southern Railroad Company, a corporation organized and existing under and by virtue of a special charter granted to said corporation by the State of Michigan by act No. 113 of the Session Laws of Michigan for the Year 1846, approved May 9, 1846.

4. That the said Michigan Southern Railroad Company, under an act of the legislature of the State of Michigan in that behalf, became consolidated with a corporation of the State of Indiana known as the Northern Indiana Railroad Company, which then owned and operated a line of railroad from the Michigan and Indiana State line to the city of Chicago, in the State of Illinois, thereby forming the Michigan Southern and Northern Indiana Railroad Company, which said company then succeeded to all the rights, franchises, property, and powers of the said Michigan Southern Railroad Company.

5. And the said Michigan Southern and Northern Indiana Railroad Company afterwards, under due legislative authority in that behalf, entered into consolidation with certain other railroad companies organized under the laws of Illinois, Ohio, Pennsylvania, and New York respectively, and thereby formed the said respondent, The Lake Shore and Michigan Southern Railway Company, and this respondent thereby acquired all rights, franchises, powers, and property of said Michigan Southern Railroad Company and of the said Michigan Southern and Northern Indiana Railroad Company, and holds and is entitled to all the rights, franchises, powers, and privileges granted in and by the charter aforesaid and by the acts of the legislature of said State to said Michigan Southern Railroad Company and the said Michigan Southern and Northern Indiana Railroad Company.

6. That under and by virtue of the said charter of the Michigan Southern Railroad Company to it all the rights, franchises, and powers of which respondent has succeeded the said Michigan Southern Railway Company had the power and authority to charge and did charge and fix the rate for the transportation of passengers over its said railroad at three cents per mile. The said rate and charge
18 of three cents per mile has ever since been maintained, charged, and paid over the lines of railroad so authorized by the said charter to be constructed by the said Michigan Southern

Railroad Company, the Michigan Southern and Northern Indiana Railroad Company, and this respondent, and respondent has had and still has the power and authority to make such charge; that the said provisions of said charter are now in full force and effect and apply to respondent and to that portion of its railroad so formerly held and owned by said Michigan Southern Railroad Company.

7. That said Adrian Station, referred to in the petition in this case, is a station of respondent situated in the county of Lenawee, in the State of Michigan, on the said line of railroad extending from Monroe to White Pigeon, so formerly owned by the said Michigan Southern Railroad Company; that none of the other said lines of railroad so as aforesaid operated by this respondent reach the city of Adrian, nor is the said city of Adrian a station upon any line of respondent's road other than the said road so formerly owned by said Michigan Southern Railroad Company, and the ticket office mentioned in said petition was and is the ticket office of said respondent upon said road so as aforesaid heretofore owned by the Michigan Southern Railroad Company, and from the petition in this cause it appears, and must have been so intended and understood, that the demand made by petitioner for a one-thousand-mile ticket was a demand for a ticket which should entitle the petitioner and his wife to transportation to and from the said city of Adrian and over the whole line of respondent's road, both in and out of the State.

8. This respondent alleges that at no time since the making of the order to show cause herein down to the 13th day of November, 1893, has the said petitioner, Henry C. Smith, or any person on his behalf paid or tendered to said respondent's ticket agent in charge of its ticket office at Adrian, Michigan, twenty dollars or any other sum, nor has said Smith or any person upon his behalf requested this respondent to issue to him a thousand-mile ticket in accordance with the terms of said order.

19 9. And this respondent is advised and submits that the provisions of the act of the legislature of 1891 referred to and quoted in this petition have no application to that portion of this respondent's line of railroad so formerly owned by the Michigan Southern Railroad Company; that said act of 1891 has no application and can have no application to this respondent and its lines of road outside the State of Michigan.

10. And this respondent is advised and shows and submits that if said act of the legislature of Michigan mentioned in said petition is held and construed to require this respondent to issue a thousand-mile ticket, in accordance with its terms, good upon the lines of road operated by it outside the said State of Michigan, it is in effect a regulation of interstate commerce and in violation of the provision of article I, section VIII, of the Constitution of the United States, which confers upon Congress the power to regulate commerce between the States.

11. And this respondent submits that said act is so uncertain and

indefinite in its terms and provisions that it is impracticable of construction or enforcement.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,
By JOHN NEWELL, *President.*

ASHLEY POND AND
C. E. WEAVER,
Attorneys for Respondent.
GEO. C. GREENE, *Of Counsel.*

20 STATE OF MICHIGAN:

In the Circuit Court for the County of Lenawee.

HENRY C. SMITH, Petitioner and Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

LENAWEE COUNTY, *ss:*

Clement E. Weaver, being duly sworn, deposes and says that he resides at the city of Adrian, in said county, and that he is now and for several years last past has been the agent and attorney of The Lake Shore and Michigan Southern Railway Company, the foregoing and above-named respondent; that he is the agent and attorney of said respondent in this cause and makes this affidavit and verification of the foregoing answer and return for and in behalf of said respondent, which said answer and return is made a part hereof; that he has full and particular knowledge of all the matters stated in said answer and return; that he has read the said answer and return and knows the contents thereof, and that the same is true of his own knowledge as therein stated, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

CLEMENT E. WEAVER.

Sworn to and subscribed before me this 20th day of November, A. D. 1893.

SETH BEAN,
Notary Public in and for Lenawee County, Mich.

21 STATE OF MICHIGAN, *County of Lenawee,* } *ss:*

I, Edwin L. Mills, clerk of the county of Lenawee and of the circuit court thereof, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of answer with the original as filed November 20, 1893, now remaining in my office, and have found the said copy a correct transcript therefrom and of the whole thereof.

Seal Lenawee Circuit Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this second day of May, A. D. 1896.

EDWIN L. MILLS, *Clerk.*

22 "EXHIBIT D."

STATE OF MICHIGAN:

In the Circuit Court for the County of Lenawee.

HENRY C. SMITH, Relator,
vs.
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

Now comes Henry C. Smith, the above-named relator, and, in reply to the answer of the above-named respondent showing cause in said matter, states that he does not understand and does not claim that the statute under which his petition is filed regulates the rate of charge or the kind of ticket respondents shall have or use outside of the lower peninsula of the State of Michigan, and he only asks in said matter that respondent be required to comply with said statute in the lower peninsula of the State of Michigan, and not in any other State or Territory.

Dated November 27, 1893.

HENRY C. SMITH.

WATTS, BEAN & SMITH,
Attorneys for Relator.

23 STATE OF MICHIGAN, } *ss:*
County of Lenawee, }

I, Edwin L. Mills, clerk of the county of Lenawee and of the circuit court thereof, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of disclaimer with the original as filed November 27th, 1893, now remaining in my office, and have found the said copy a correct transcript therefrom and of the whole thereof.

Seal Lenawee Circuit Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this second day of May, A. D. 1896.

EDWIN L. MILLS, *Clerk.*

24 "EXHIBIT E."

STATE OF MICHIGAN:

In the Circuit Court for the County of Lenawee.

HENRY C. SMITH, Relator,
vs.
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

At a session of said court held in the court-house, in the city of Adrian, in said county, on the fourth day of April, A. D. 1896.

Present: Honorable Victor H. Lane, circuit judge.

In pursuance of an order made October 20th, 1893, that respondent show cause why it should not issue to said Henry C. Smith and his wife, Emma Watts Smith, a thousand-mile ticket, this matter came on to be heard, and after hearing Watts, Bean & Smith and Fred A. Maynard, attorney general, for the relator, and C. E. Weaver, Ashley Pond, and George C. Greene, for the respondent, after due deliberation had thereon, it is by the court now ordered, adjudged, and decreed that a writ of mandamus do issue, directed to the said respondent, The Lake Shore and Michigan Southern Railway Company, commanding it to issue to said relator, upon payment or tender to it or to its ticket agent in charge of its ticket office at Adrian, Michigan, of twenty dollars, lawful money of the United States, a thousand-mile ticket in the name of said Henry C. Smith and his said wife, as required by the act of the legislature of the State of Michigan mentioned in the petition herein, being subdivision 9 of section 9 of article 2 of chapter 91 of Howell's Annotated Statutes, as amended by act No. 90 of the public acts of 1891; that said
25 ticket shall be good upon and limited to the railway lines operated by respondent within the State of Michigan.

The court orders it to be certified and made a part of the record in this case and of the order and decree granted herein that in the decision of this case and rendition of said order and decree it became and was necessary and material to the case to determine whether the act of the legislature of the State of Michigan mentioned in the petition herein, being subdivision 9 of section 9 of article II of the general railroad laws of the State, as amended by act No. 90 of the public acts of 1891, is in violation of or repugnant to article XIV of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and also whether said act of the legislature is in violation of or repugnant to the 8th section of article I of said Constitution, which declares that "The Congress shall have power * * * to regulate commerce * * * among the several States," and that the validity of said act was drawn in question on the ground of its being repugnant

to said Constitution, and the decision was and is in favor of its validity.

And it is further certified that upon the argument of said cause the question of a demand upon respondent by relator for a ticket limited to its lines within the State of Michigan was expressly waived by counsel for respondent, and it was agreed that the cause should proceed the same as if such demand had been made and refused.

(Signed) VICTOR H. LANE,
Circuit Judge.

26 STATE OF MICHIGAN, } ss:
County of Lenawee, }

I, Edwin L. Mills, clerk of the county of Lenawee and of the circuit court thereof, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of order of April 4, 1896, with the original as entered, now remaining in my office, and have found the said copy a correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this second day of May, A. D. 1896.

Seal Lenawee Circuit Court.

EDWIN L. MILLS, *Clerk.*

27 The foregoing petition for certiorari is endorsed:

Let a writ of certiorari issue as prayed. May 5, 1896. Chas. D. Long, chief justice. Filed May 5, 1896. Chas. C. Hopkins, clerk supreme court.

28 (*Writ of Certiorari.*)

In the name of the People of the State of Michigan to the judge of the circuit court for the county of Lenawee:

[Seal Supreme Court Michigan.]

We, being willing, for certain causes, that it should be certified to our supreme court what proceedings have been had before you and what has been done by you in the matter of granting a peremptory writ of mandamus in a cause pending in said circuit court wherein Henry C. Smith is relator and The Lake Shore & Michigan Southern Railway Company is respondent:

Do therefore command you that you distinctly and openly certify the records and proceedings in said matter to the said supreme court, before the justices thereof, that they may have them at the supreme court room, in the capitol, in the city of Lansing, on the twenty-fifth day of May, A. D. 1896, that said court may cause to be done thereupon what of right ought to be done, and have you then and there this writ.

Witness the Honorable Charles D. Long, chief justice of our supreme court, at Lansing, this fifth day of May, in the year of our Lord one thousand eight hundred and ninety-six.

CHAS. C. HOPKINS,
Clerk Supreme Court.

I hereby certify that the foregoing writ was duly allowed by Honorable Charles D. Long, chief justice of the supreme court of Michigan, on the fifth day of May, 1896.

CHAS. C. HOPKINS, *Clerk.*

[Seal Supreme Court Michigan.]

29 (*Return to Certiorari.*)

STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
vs.
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

To the supreme court of the State of Michigan:

The undersigned, judge of the circuit court for the county of Lenawee and State of Michigan, in response to the writ of certiorari issued in said cause May 5th, 1896, and to him directed, does hereby distinctly and openly certify the records and proceedings in said matter as follows:

1. Exhibit "A" attached to the petition for said writ is a copy of the petition of relator filed in said cause.

2. That on October 20th, 1893, an order was made in said cause, and that Exhibit "B" attached to the petition for said writ is a true copy thereof.

3. That Exhibit "C" attached to said petition is a copy of the answer of relator filed in said cause.

4. That on November 27th, 1893, relator filed a disclaimer or statement in said cause, and that Exhibit "D" is a true copy of the same.

5. That on April 4th, 1896, it was adjudged and determined that a writ of mandamus issue, and that Exhibit "E" attached to said petition is a copy of the order made; and further certifies and returns that on the hearing of said cause the point was made that no demand was made for the issuing of a ticket to relators pursuant to the requirement of the order, Exhibit "B" to relator's petition. After some discussion it was agreed in open court that the case might be heard and considered as though such demand had been made and respondent had declined to issue a ticket pursuant
30 to it. At this time relator's petition, respondent's answer, and relator's disclaimer were before the court. Respondent also claimed that relator's petition having demanded the right for a ticket over all respondent's lines, it was not within the power of the court to limit the ticket to the lines of Michigan. No definite language was used at the time the waiver was made which clearly defined the extent of the waiver. It was understood by the court, however, that relators were at that time only insisting upon their right to a ticket over the lines of respondent in Michigan, and the court understood that such a demand as would lay a foundation for

the issuing of a writ, as then insisted upon by relator, was waived, nor was any definite waiver of any other objection made by respondent at any time.

6. Further certifies and returns that it did appear by said answer, filed by respondent, and by admissions of respondent in open court, that it owned and operated a line of railroad from Buffalo, New York, to Chicago, Illinois, passing through New York, Pennsylvania, Ohio, Indiana, and Illinois, over what is known as its air line from Toledo, Ohio, to Elkhart, Indiana, and also extending from said Buffalo to said Chicago over its old line, which passes from said Toledo to said Adrian, Michigan, and thence to said Elkhart, and thence to said Chicago, and also a line of road extending from Monroe, Michigan, to Lenawee Junction, Michigan, and from said Lenawee Junction to Jackson, Michigan; that said city of Adrian was a station on the line of the said road in Lenawee county, Michigan; that the most westerly station in the State of Michigan on its said road was White Pigeon, and that said road crossed the State line between Indiana and Michigan 4.02 miles westerly from said White Pigeon; that all of said railroads were operated under one system and under the name of the Lake Shore and Michigan Southern Railway Company.

7. That it appeared from said answer and from admissions in open court and the map used in the argument that said road from Jackson to Lenawee Junction and from said Monroe to said
31 Elkhart, passing through the city of Adrian, was formerly the railroad of the Michigan Southern Railway Company, which company held a lease of the Erie & Kalamazoo Railway Company from Adrian to Toledo in perpetuity.

8. And it further appeared that said Michigan Southern Railway Company had no directors nor officers nor separate stockholders, and had not had since the consolidation of said Michigan Southern Railway Company with the Northern Indiana Railway Company, the Cleveland & Toledo, the Cleveland, Painsville & Ashtabula, and the Buffalo & Erie Railway Companies under the name of Lake Shore & Michigan Southern Railway Company.

9. And I held that respondent had not succeeded to the contract rights, franchise, and power of said Michigan Southern Railway Company under the charter of said company except as subject to the general railroad laws of this State, as to the lines operated by it in this State.

10. And I found that by the consolidation of said railway companies, operating under the name of Lake Shore & Michigan Southern Railway Company, that the Michigan Southern Railway Company surrendered its charter rights to charge three cents per mile, and that respondent does not have the power to charge three cents per mile for the transportation of passengers within this State except as authorized by the railroad laws of this State.

11. And I found that the said charter of the Michigan Southern Railway Company did not apply to relator, but that it is subject to the general railroad laws of this State as to the lines operated in this State.

In witness whereof I have hereunto set my hand this — day of May, A. D. 1896.

Respectfully submitted.

VICTOR H. LANE,
Judge of the Circuit Court for the County of Lenawee.

Endorsed: Filed May 13, 1896. Chas. C. Hopkins, clerk supreme court.

32 Office of Lenawee county clerk; E. L. Mills, clerk.

ADRIAN, MICH., *May* 18, 1896.

DEAR SIR: In the return to the writ of certiorari in case of Henry C. Smith *vs.* Lake Shore & Michigan Southern R'y Co., I have called attention of counsel to an amendment which I desire to make, and there is consent that I may suggest it to you, and ask you to write it in the return.

It is as follows: After the word "waived," in the latter part of paragraph "V" of the return, add the following: "nor was any definite waiver of any other objection made by respondent at any time."

If you will be kind enough to make this amendment I will be obliged to you.

Sincerely yours,

V. H. LANE,
Circuit Judge.

To Chas. C. Hopkins, clerk supreme court.

33 STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
vs.
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Appellant.

In this cause the return having been made before the return day, it is stipulated that the cause be placed upon the calendar for hearing at the next term of court, copy of writ having been served upon attorneys for relator, together with notice of hearing.

Dated May 19, 1896.

WATTS, BEAN & SMITH,
Attorneys for Relator.
ASHLEY POND,
A. C. ANGELL,
C. E. WEAVER,
Attorneys for Respondent and Appellant.

Endorsed: Filed May 21, 1896. Chas. C. Hopkins, clerk supreme court.

34 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the nineteenth day of June, in the year of our Lord one thousand eight hundred and ninety-*seven* six.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Defendant and Appellant.

This cause coming on to be heard is argued by Messrs. Maynard and Watts for the relator and by Mr. George C. Greene for the respondent and submitted.

35 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the first day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Appellant.

In this cause an opinion is filed, in accordance with which a judgment will be hereafter entered.

36 (*Opinion.*)

Supreme Court of Michigan.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

The relator applied to the respondent company for a one-thousand-mile mileage book, to be issued in the name of himself and wife, and was refused. He thereupon brought this proceeding in the circuit court to compel the respondent to issue such a ticket. The circuit judge granted an order that a ticket good upon the lines of the respondent in this State be issued, and this order is the one now under review.

The action is based upon the amendment to section nine of the railroad law adopted and embodied in act No. 90 of the public acts of 1891, which contains the following provisions:

"One-thousand-mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State, or carrying on business partly within and partly without the limits of this State, at a price not exceeding twenty dollars in the lower peninsula and twenty-five dollars on the upper peninsula. Such one-thousand-mile tickets may be made non-transferable, but, whenever required by the purchaser, they shall be issued in the name of the purchaser, his wife and children, designating the name of each on each ticket. * * * Each one thousand-mile ticket shall be valid for two years only after date of purchase."

In the same section of the statute it is provided that the rates of fare shall not exceed two cents a mile for carriage of passengers by railroads whose gross earnings are more than three thousand dollars per mile, two and a half for roads whose gross earnings are
37 more than two and less than three thousand dollars, and for companies whose earnings are less than two thousand dollars per mile three cents per mile, except in the upper peninsula, where a higher rate is permitted.

It is contended that there was error in the ruling below, and various grounds are alleged.

First. It is contended that the statute is an attempt on the part of the legislature to provide for the sale of mileage which shall be good outside of the State, and that as this affects interstate commerce it is unconstitutional.

Second. That the charter of the Michigan Southern Railway Company, passed in 1846, which provided that "it shall and may be lawful for said company from time to time to fix, regulate, and receive the dues and charges taken for transportation of property and persons on said railroad as aforesaid. * * * Provided, said company shall charge no greater sum for the transportation of persons and property than were charged or authorized by the State of Michigan to be taken by the Southern railroad on the first day of January last," is still in force, and, as it was granted prior to the amendment of the constitution reserving the right to alter or amend charters of corporations organized under the laws of the State, that the legislation in question impairs the obligation of contracts, within the doctrine of the Dartmouth College case, and is for this reason invalid.

Third. That, independently of this provision, the act is unconstitutional for the reason that it is an attempt to compel railroad companies to enter into contracts to be performed in the future at any time within two years, and is an invasion of the right to the use of property; and in the same connection it is contended that this is in violation of the fourteenth amendment of the Constitution of the United States, which provides that no person shall be deprived of property without due process of law.

Fourth. It is contended that the amendment to the constitution, article 19*a*, sec. 1, is a limitation upon the power of the legislature to legislate as to rates and charges of transportation, and
38 limits the right in that regard to the fixing of maximum rates, and that the provision for the issuing of a mileage

book is not a fixing of maximum rates of charge, but is a further regulation.

I. The first contention cannot be allowed for the reason that the statute, fairly construed, was intended to limit the use of the mileage ticket to the State of Michigan. It fixes the price of the ticket—not exceeding twenty dollars in the lower peninsula and twenty-five dollars in the upper peninsula. While the language is not very apt, we think it was the clear intention that a ticket, the price of which should be twenty dollars for one thousand miles of transportation, would be one entitling the purchaser to carriage in the lower peninsula of Michigan, and one at twenty-five dollars to carriage in the upper peninsula, and that it was not the intention by this reference to locality to fix the place where the tickets should be placed on sale. Thus construed, the statute cannot be held to be a regulation of interstate commerce.

II. The answer of respondent sets out that in 1846 a special charter, containing the provisions above quoted, was granted to the Michigan Southern Railroad Company; that subsequently the Michigan Southern Railroad Company, under an act of the legislature of the State of Michigan, became consolidated with a corporation of the State of Indiana known as the Northern Indiana Railroad Company, thereby forming the Michigan Southern & Northern Indiana Railroad Company, which company then succeeded to all the rights, franchises, property, and powers of the Michigan Southern Railroad Company; and that the Michigan Southern & Northern Indiana Railroad Company afterwards, under due legislative authority in that behalf, entered into consolidation with certain other railroad companies, organized under the laws of Indiana, Ohio, Pennsylvania, and New York, respectively, and thereby formed the said respondent, The Lake Shore and Michigan Southern Railway Company, and that this respondent thereby acquired all the rights, franchises, powers, and property of the Michigan Southern Railroad Company and the Michigan Southern & Northern Indiana Railroad Company, and holds and is entitled to all the rights, franchises, powers, and privileges granted in and by the charter aforesaid and by the acts of the legislature of the said State.

39 The last consolidation set up was under act No. 82 of the Laws of 1855, entitled "An act to provide for the incorporation of railroad companies."

Section 50 provides that "any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this State, into a single corporation. * * * Such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations; and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters or laws of organization, not inconsistent with the provisions of this act."

By section 52 it is provided that "upon the election of the first board of directors of the corporation created by said agreement, all

and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, all and singular their rights and interests in and to every species of property and things in action, shall be determined to be transferred to, and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with all the right of way and other property, in the same manner, and to the same intent as if the said two or more corporations, parties to such agreement, should have continued to retain the title and transact the business of such corporations."

It is contended by the defendant that under this statute, where a consolidation takes place of a corporation organized and existing under a special charter, as did the respondent company, with a corporation or corporations existing under the laws of another State, the effect is not to annihilate the previously existing Michigan corporation, but that upon the consolidation the original corporation brings to the new entity the powers and privileges already possessed, and that the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed and succeeds there to its privileges.

40 The learned counsel for respondent cites, as sustaining this view, State Treasurer *v.* Auditor General, 46 Mich., 224; Chicago & Northwestern Railway Co. *v.* Auditor General, 53 Mich., 79; Nashua & Lowell R. R. Co. *v.* Boston & Lowell R. R. Co., 136 U. S., 356; People *v.* Railway Co., 129 N. Y. 474.

Passing the consideration of these cases for the time and having reference to the terms of the act under which the consolidation took place, it is to be observed that this act constituted the consolidated entity a new corporation, if we regard the terms employed in the statute, both in section 50, above quoted, which limits the rights and franchises derived from the old corporation and to be exercised by the new to such as are not inconsistent with the provisions of the act, and in section 52, relied upon by respondent, as well the new creation is referred to as "such new corporation." It is also a corporation created under a general law. At the time of its creation section 1 of article XV of the constitution provided that corporations might be formed under general laws, and that "all laws passed pursuant to this section of the constitution may be amended, altered, or repealed."

It was said in Muller *v.* Dows, 94 U. S., 444, of such a corporation so formed: "The two companies became one, but in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone."

In State Treasurer *v.* Auditor General, 46 Mich., 224, and Chicago & Northwestern R'y Co. *v.* Auditor General, 53 Mich., 79, the question was as to what portion of the earnings of the consolidated company were subject to taxation in this State.

In State Treasurer *v.* Auditor General it was held that the Lake Shore & Michigan Southern railway was not a corporation formed under the general railroad law within the meaning of the clause of the statute providing for taxing railroad companies so formed.

In Chicago & Northwestern Railway Co. *v.* Auditor General the same doctrine was held.

It was said in the latter case: "We appreciate very fully
41 the difficulty of determining under all circumstances in what light we are to regard the anomalous organizations which are formed by the consolidation of two or more corporations which have received their corporate powers from different sovereignties." The case of Peik *v.* Railway Company, 94 U. S., 164, was cited with approval. In that case it was held that the State in which the road lay may legislate for the consolidated company in that State precisely as before the consolidation.

Neither of the two Michigan decisions determined what legislative control the legislature of the State has over that portion of the road which lies within the State, or as to the conduct of business within the State.

And this may also be said of People *v.* Railway Company, 129 N. Y., 474.

The companies at present forming the respondent derived rights under the law permitting a consolidation, and, while there may be difficulty in subjecting so much of the property of the consolidated company as lies without the State to our jurisdiction or in controlling the transactions of the corporation itself without the State or in fixing taxation upon a basis which rests upon its earnings outside the State it is not apparent why the company as to its exercise of corporate functions within the State is not subject to the terms of the act authorizing its consolidation, as limited by the constitutional provision in force at the time, or why it is not subject to local legislation.

Counsel also cite the case of Tomlinson *v.* Branch, 82 U. S., 460, and Central Railroad *v.* Georgia, 92 U. S., 665.

In the former case the act provided that upon the written consent of all the stockholders of the South Carolina Canal & Railroad Company the said South Carolina Canal & Railroad Company shall be merged in the said South Carolina Railroad Company. It was held that the South Carolina Railroad Company retained the rights which it had before the merger.

The case of Railroad Co. *v.* Georgia was to the same effect.
42 There the Macon & Western Railroad Company was merged under the name and charter of the said The Central Railroad & Banking Company of Georgia.

But in Railroad Co. *v.* Georgia, 98 U. S., 359, it was held that where a consolidation took place the effect was the creation of a new corporation out of the stockholders of the two previously existing corporations. It was said: "The consolidation provided for was clearly not a merger of one into the other, as was the case of Central Railroad & Banking Company *v.* Georgia, 92 U. S., 665."

The question was raised in a case where this same defendant was a party in interest, in Shields *v.* State, 26 Ohio St., 86. In that case the court say: "Among the companies forming this consolidation were two Ohio companies, chartered and organized before the adoption of the present constitution, and whose charters were therefore not

subject to the provision of the present constitution, which gives to the legislature the power of alteration, amendment, and repeal of charters. * * * The consolidation took place in 1869, and was effected in all respects in pursuance of the act of April 10, 1856, and the claim is that a consolidation under that act is to be regarded in law as a surrender or relinquishment of the several individual charters of the companies so uniting and the acceptance of a charter *de novo* from the State."

The court held that the consolidation constituted a new corporation, and the fact that it was formed out of old, defunct corporations did not make it any the less a corporation created by the legislature. It was said: "It is not the material out of which it is formed, but the plastic hand that formed it, that we look to for its character and status under the constitution." This case was affirmed on appeal by the Federal Supreme Court in 95 U. S., 319.

The question was again before the Federal court in St. Louis & San Francisco Railway Company *v.* Gill, 156 U. S., 649. In that case there was a consolidation of two railroads operating in Missouri and Arkansas. It was claimed that notwithstanding this legislation the railroad company, so far as related to its busi-
43 ness in Arkansas, was entitled to fix its rate of charges in accordance with the law of its original corporation.

The court said: "It has been frequently decided by this court that a special statutory exemption or privilege, such as immunity from taxation or a right to fix and determine rates of fare, does not accompany the property in its transfer to a purchaser in the absence of express direction to that effect in the statute," thus treating the consolidation as a purchase by the new entity.

III. Passing by the third contention and considering first the effect of article 19*a*, section 1, of the constitution, this section reads as follows: "The legislature may, from time to time, pass laws establishing reasonable maximum rates and charges for the transportation of passengers and freight on different railroads in this State," etc.

The contention is that this section is a limitation upon the authority of the legislature, and that as to the fixing of rates the power is exhausted when maximum rates are established, and that the act in question is not a fixing of maximum rates within the constitutional provision.

In the opinion of Mr. Justice Cahill in Wellman *v.* Railway Co., 83 Michigan, at page 624, it is said: "Nor do I think that the constitutional amendment of 1870, before cited, which expressly provides that 'the legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State,' is no more than declaratory of a power that already existed. * * * The amendment of 1870 was neither a grant nor a limitation of power. It was a declaration of power already reserved in the constitution, and the amendment served only to put beyond question the right of the legislature, which was before thought to be open to debate."

The maxim *expressio unius est exclusio alterius* is not wholly inapplicable in the interpretation of constitutional provisions.
44 See Endlich on Interpretation of Statutes, sec. 533; Cooley's Con. Lim., pp. 78 and 79.

Speaking of this rule as applied to the construction of constitutional provisions, Mr. Justice Green, speaking for the court in Williams *v.* Mayor, etc., 2 Mich., 563, said: "That certain legal maxims or rules of construction which have been found generally applicable afford important aid in arriving at the intention of those who framed the law every lawyer will admit; but that there are some instruments or laws to which such maxims cannot be strictly applied without doing manifest violence to the plain intent of the framers of the law is also a matter of common experience. This is especially true in the construction of State constitutions, as will appear manifest when we consider their character and objects."

See also Commonwealth *v.* Hartman, 17 Pa. St., 118; People *v.* Wright, 6 Col., 92; Matter of Thirty-fourth Street R. R. Co., 102 N. Y., 343.

The constitution of New York placed certain restrictions upon street railway companies. The legislature by a general act embodied the constitutional conditions and annexed a third or additional condition not enjoined by the constitution. The contention was made that the constitution had prescribed the conditions upon which street railroads might be constructed, and by implication thereby enjoined the imposition by the legislature of conditions other than those prescribed therein.

The court said: But the constitution neither by express language nor by implication abridges the legislative power over the subject outside of the matters particularly enumerated. It needs no citation of authorities to sustain the postulate; that, except as restrained by the constitution, the legislative power is untrammeled and supreme, and that a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control. Nothing is subtracted from the
45 sum of legislative power except that which is expressly or by necessary implication withdrawn. The legislature is prohibited from granting a franchise to construct a street railroad except upon certain specified conditions; but it is not prohibited from annexing further conditions not inconsistent therewith, and whether other conditions are necessary or proper is a matter resting in the wisdom and discretion of the legislature.

It is said that the statute having fixed the maximum rate at three cents as to certain roads earning less than two thousand dollars per mile and two and a half cents and two cents respectively for roads earning more than two thousand dollars per mile that this exhausts the power of the legislature, and that no power exists to provide for a less rate where mileage books are used.

In my judgment the term maximum rate as used in this consti-

tutional provision means the maximum rate which the company is to be permitted to charge under a given set of circumstances. Under the terms of this act the company not furnishing mileage books may be compelled to furnish them at the rate of two and a half or two cents a mile respectively, or it may charge for the single fare three cents. By this same act all roads are entitled to charge three cents per mile for a distance not exceeding five miles.

It might be said, with as much force as the proposition under discussion can be urged, that by this provision the legislature has fixed the maximum rate at three cents and thereby exhausted its power. The answer is obvious, viz., that in fixing the rate at three cents for a distance less than five miles (in the lower peninsula) the legislature fixed the maximum rate for that service to be paid the road by one making just that contract. If this answer is not valid, the court and counsel in the Wellman case overlooked wholly a controlling question which would have ruled the case the other way from that in which it was decided.

In the case of The Interstate Commerce Commission *v.* Baltimore & Ohio Railroad Co., 145 U. S, 263, section 2 of the interstate commerce act was under consideration. That section provides "that if any common carrier subject to the provisions of this act shall,
46 direct or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The language of Judge Jackson, of the circuit, was approved as follows: "To come within the inhibition of said sections, the differences must be made under like conditions—that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one or undue disadvantage to the other in order to constitute unjust discrimination."

IV. It is difficult to define the precise limit of power reserved to the legislature under a provision embodied in the fundamental law or incorporated in the charter of a corporation reserving the right to the legislature to alter, amend, or repeal.

The question has been before this court in numerous cases, the latest being the case of Attorney General *v.* Looker, 69 N. W. Rep., 929, where the authorities are collated.

In the case of Detroit *v.* Detroit & Howell Plank Road Co., 43 Mich., 140, Mr. Justice Cooley, speaking of the provision of the Constitution of the United States which forbids the impairing of obligations of contracts, says that but for this provision "the power to amend
47 and re*a*peal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations and with the powers which it would then possess. It might therefore do what it would be inadmissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles; and it cannot be necessary at this day to enter upon a discussion in denial of the right of the Government to take from either individuals or corporations any property which they may rightfully have acquired."

We think this is a fair statement of the effect of this reservation, and that if the legislation in question can be construed as depriving the respondent of its property it is invalid, as conflicting with other constitutional provisions; but we do not think that such is the effect of this legislation. It cannot be said that the right to use property dedicated to a public use in precisely the manner which the owner may choose to use it is a vested right of property. This question has been put at rest by a long line of decisions, beginning with Munn *v.* The People, 69 Ill., 80, and including Wellman *v.* Railway Co., 83 Mich., 592.

The chief contention is that because this statute requires the company to enter into contracts for future transportation of passengers covering a period of two years it is therefore withdrawing from the company the right to manage its own property, and is, for this reason, invalid.

It may be said that every attempt to fix rates of toll or rates for the carriage of passengers or transportation of property to some extent involv*ing* an interference with the management and control of its property by the railroad company. Having in mind the common method of conducting railroad business at the present day, the court can take judicial notice of the fact that nearly every railroad in this State does issue and did, prior to the enactment
48 of this law, issue mileage books or one-thousand-mile tickets. The conditions were not precisely the same, but they were contracts good for one year and issued at a reduced rate, so that in the usual conduct of business time contracts for the transportation of passengers are made. In fact, it would be difficult to conceive of a method of conducting a railroad business which did not involve a contract good for some length of time.

In the brief of the learned counsel for respondent we are cited to a large number of cases in which it has been held that it is competent for railway companies to make regulations limiting the time within which a ticket may be used, and this is undoubtedly true in the absence of legislation, but we think it cannot be successfully contended that it would not be competent for the legislature to provide that a ticket furnished to a passenger should be good for a

definite reasonable time, and when such legislation was adopted it would of necessity deprive the company of the power to make rules inconsistent therewith.

I confess I cannot share the apprehension that such a regulation as the one here involved will deprive the company of the management of its business. Would any one contend that the legislature has not the power to require railroad companies to keep on sale at its station tickets of any kind? The compulsory requirement of this act may indeed be denounced as an attempt to conduct the business of the company, but I apprehend that extended argument is not necessary to defend the right of the legislature to make such requirement.

In Elliott on Railroads, section 1598, it is said that "in some of the States it is provided by statute that tickets shall be good for a certain number of years, notwithstanding any limitation thereon."

I am not aware that these statutes have been attacked. If such enactment be within the power of the legislature, where is the line to be drawn short of that fixed by the Federal Supreme Court, which is that legislation of this character must not be so unreasonable as to deprive the company of the use of its property.

49 The only case to which our attention has been called in which the subject of legislation requiring the sale of mileage books has been under consideration is that of The Attorney General *v.* Old Colony Railroad Co., 160 Mass., 62. The legislation there under discussion provided for an interchangeable mileage book, good on all the roads of the State. The court divided, a majority of the court holding such legislation to be unconstitutional, in that it required one company to do business upon the credit of another. The majority of the court distinctly limit the decision to that ground, and apparently did not find a regulation requiring the issue of mileage books to be unreasonable. Mr. Justice Knowlton, with whom Mr. Justice Holmes concurred, reached the opposite conclusion, and of necessity affirmed the power of the legislature to provide for the issuing of mileage books.

My conclusions are that the regulation is not unconstitutional as applied to roads within the control of the legislature, and that the respondent road by its consolidation, formed as it is by a consolidation under an act passed since the enactment of the constitution reserving the power to alter, amend, or repeal, is subject to the general control of the legislature, and that the judgment of the circuit court should be affirmed.

R. M. MONTGOMERY.
CHAS. D. LONG.
J. B. MOORE.

50 Supreme Court of Michigan.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

By act No. 90, public acts of 1891, the railroad law was amended, fixing the maximum rate for the transportation of passengers at from two to three cents per mile, according to the gross earnings of the passenger trains of the various roads. The same act requires all railroad companies in this State or carrying on business partly within and partly without the State to keep for sale at their principal ticket offices thousand-mile tickets, to be issued in the name of the purchaser, his wife and children, and to be valid for two years, at the rate of twenty dollars in the lower and twenty-five dollars in the upper peninsula. The relator tendered the respondent-defendant twenty dollars and demanded a thousand-mile ticket, to be issued in the name of himself and his wife. The respondent refused to accept the money and issue the ticket, whereupon the relator filed a petition in the circuit court for the county of Lenawee, praying for the writ of mandamus to compel the issuance of the ticket. The court below granted the order and the respondent appealed.

The constitution, article 19, section 1, provides that "the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State," etc. One of the railroads doing business in this State contested in the courts the validity of the above provision fixing maximum rates. That provision of the law was held valid. Wellman *v.* C. & G. T. R'y Co., 83 Mich., 593.

51 That decision held that the reasonableness of the rate was for the sole determination of the legislature, and not for the courts. The case was affirmed in the Supreme Court of the United States, that court, however, holding that the reasonableness of the maximum rate was for the determination of the courts and not exclusively in the legislature, and that whenever that rate was so low as to deprive the railroad companies of a reasonable income from their legitimate investments the result was to deprive them of their property, or, what is the same thing, the use of it, without due process of law, and therefore void under the Constitution of the United States. Wellman *v.* C. & G. T. R'y Co., 143 U. S., 339.

It is now the established rule that the question is a judicial one, and that while the courts cannot establish the charges they will inquire into their reasonableness and determine whether the rates are such as to deprive the corporation of their property without due process of law. St. L. & San Fran. R'y Co. *v.* Gill, 156 U. S., 657, and authorities there cited.

But the above decisions and many others upon the same subject, which are cited in the briefs of counsel, do not in my judgment

bear upon the question now raised. All those cases involve the validity of maximum rates fixed by the legislatures under the implied or express power of the State constitutions. The difficulty which for a long time confronted the courts was not in determining whether the power to fix a reasonable maximum rate existed, but what was the limitation of the power. As late as 1893 the supreme court of Massachusetts, in Attorney General *v.* Old Colony Railroad, 160 Mass., 89, recognized the existence of the power, but said, "It is not yet settled, however, what the limitations of this power are, whether it is limited to such rates as a court may deem reasonable or only to such rates as shall not operate to deprive the railroad companies of their property without reasonable compensation or without due process of law." That question was settled in Railway Company *v.* Gill, *supra*, decided the following year. We are
52 cited to no case, nor have I been able to find any, which involves a legislative enactment like the one now presented for our determination.

Several defences are interposed, but I deem it important to refer to but one, which I think is conclusive against the relator, viz: Does the legislature possess the power under the constitution of this State to enact this provision requiring railroad companies to fix charges below the maximum rates, and compel them to enter into contracts for two years or for any number of years which the legislature may see fit to prescribe?

The learned counsel for the relator contend that the power is inherent in the legislature to "regulate, control, and fix the conditions of all contracts between railroad companies and their patrons." They further say, "It is merely a regulation of the public business, which the legislature has the right to regulate. Its apparent object is to promote the convenience of persons having occasion to travel on the road and to reduce for them the cost of transportation. Its benefit to the public who are compelled to patronize railroads is unquestioned. It brings the reduction of rates of two cents per mile within the reach of all persons who may have occasion to make only infrequent trips."

No authority is cited which sustains so unlimited a power. If it be sustained these companies have no control over their affairs and business, except to carry out such contracts for common carriage as the legislature may see fit to prescribe. If the legislature may compel these companies to carry married men, their wives and children, at reduced rates, it may also include their servants and employees upon the same ticket, and also the transportation of their goods at reduced rates. It may require the issuance of these tickets to clubs of two or any greater number. It may fix excursion rates at still lower figures and prescribe the time for which they may be valid. It may make such contracts valid for any number of years; and under the relator's contention the courts must determine in each case whether the requirements are reasonable. Certainly citizens who have invested their money in these corpora-
53 tions are entitled to some control over their business and affairs. It is difficult to understand what control is left to

them if this law be sustained. Under the opinion of the learned circuit judge who heard the case he should have denied the writ. His opinion is against the judgment rendered. He used the following language: "Upon the other questions I care only to remark that this particular provision of the statute, the aid of which is invoked in this case, if constitutional, would seem almost to extend the police power of this State to the practical management of the business of the railway companies, and leave no line beyond which it could be said that the State cannot assume to control what are practically the private business affairs of the corporation. And it certainly will not be contended in the present condition of the law that there are not elements of the business affairs of railroad companies with which the State has no more right to interfere than with those of private individuals. The State has assumed to exercise its police power over railroad companies upon the theory of protection to the public from injuries which might arise from improper construction of its road or rolling stock or from faulty operation of them. Thus it assumes to control the construction of its engines and cars so far as the question of the safety of persons using them may require; the operation of its trains so far as it is necessary to protect the persons on them and those who may rightfully be upon its tracks; the grade at which they may cross one another, with the same idea in view, and as well the maximum rate of fare so far as necessary to protect the public from extortion; but mere questions of expediency have not been considered the subject of legislative control. Considerations of this nature would tend to lead me to the conclusion that this law ought not to be sustained, did I feel myself free to pass upon such a question."

It was, in my opinion, the clear duty of the circuit judge to enter judgment in accordance with his convictions.

The constitution grants the legislature the right to fix a reasonable maximum rate. This excludes the power to fix any
54 other rate. It affords the public ample protection against exorbitant and unjust charges. An affirmative grant of power often, though not always, implies an exclusion of other supervision upon the same subject. Mr. Story says: "The truth is that in order to ascertain how far an affirmative or negative provision excludes or implies others we must look to the nature of the provision, the subject-matter, the object, and the scope of the instrument. These and these only can properly determine the rule of construction. There can be no doubt that an affirmative grant of power in many cases will imply an exclusion of all others." Story on the Constitution, sec. 448. Does not the express power to fix a maximum rate exclude the power to fix a maximum or any other rate? If this same act had fixed a minimum of two cents per mile and prohibited the carriage of passengers at a less rate, would counsel contend for the existence of these powers? The result of such a provision would be to prevent railroads from giving cheap excursions, now so common, and which accom-odate and benefit the people. The object of this constitutional provision is to prevent the imposition of extortionate or unreasonable charges and to secure to

the traveling public a just and reasonable charge, one which would give a reasonable return to investors and a fair and reasonable rate to the public. The legislature performed this function by fixing two, two and a half, and three cents per mile as just and reasonable maximum rates. The public are thereby protected. Why should not all contracts within that rate be left to the railroad companies? Is not that a reasonable construction to be placed upon this clause of the constitution? If these companies choose to accom-odate the public by offering reduced rates by mileage, coupon, club, or excursion tickets is not that within the reasonable maximum rate fixed and a proper matter for their own control? I can find no reason or excuse for holding otherwise.

If, however, I am wrong in the conclusion that this express power inhibits the exercise of any other upon the same subject, I am still of the opinion that the act cannot be sustained under the
55 police power inherent in the legislature under the constitution. The legislature does not possess all the powers not inhibited by the constitution, and when one seeks to defend its acts under the police power he must be able to show that the act is for the protection of the lives, persons, property, or rights of citizens, or for the safety and good order of society.

The police power inherent in the legislature is not broad enough to cover every legislative interference with property or personal rights upon the ground that there is no express inhibition of the power to be found in the constitution. Every person has the inalienable right to the possession, use, and control of his property and business so long as he observes the common-law maxim, *sic utere tuo ut alienum non lædas*. The legislature may authorize municipalities to determine of what material the merchant or manufacturer shall construct his building within the city limits, to see that they are properly built, and that the plumbing, sewerage, etc., are sanitary. These things are essential to protect the health and lives of employés, patrons, and the public generally. The general public is interested, and hence the legislative interference with what are otherwise the natural rights of individuals is essential and necessary for the good of all; but if the legislature should attempt to fix the size of the building, the dimensions of its rooms, the price of merchandise to be bought and sold, when he should open or close his store or factory, and the terms of contracts he should make, the courts would not hesitate to declare such acts unconstitutional, notwithstanding no express inhibition can be found in the constitution. The common law secured these rights to the citizens because their exercise created no injury to others nor was of concern to the public. They were within the maxim above quoted. When the constitution was adopted these common-law rights were preserved, and it was unnecessary to declare in the constitution that they remained sacred and intact and that the legislature could not interfere with them. The constitution was adopted with reference to these
56 existing rights and impliedly inhibits the legislature from infringing upon them. Among these inherent rights of the citizen is the power to conduct his own business and to make such

contracts as he pleases. This right is the same whether the citizen be a natural or an artificial person. Only when the general public are concerned, for their own safety and protection, may the people, through the legislature, protect themselves against exhorbitant charges or the conduct of business in a manner injurious to the public.

The constitution is entirely silent upon the subject of contempts. Yet it is held that the legislature cannot take away this power from the courts, which has from the earliest time been inherent in them. *In re* Chadwick, 67 N. W. Rep., 1071, we there said: "The constitution leaves this power existing in the court, as it was at the common law." So the constitution leaves to the citizen the control of his property and business, subject to the rules of the common law. "Constitutions are to be construed in the light of the common law and of the fact that its rules are still in force." 3 Am. & Eng. Enc. of Law, 679.

Justice Cooley states the rule thus: "The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society." Cooley's Con. Lim., 577.

Black says it includes "all such regulations as may be necessary for the safety and good order of society," and adds: "It is evident that the term 'police power' is a very flexible and comprehensive expression and difficult of exact definition. But it must not be extended beyond its necessary and proper limits. When the police power has fulfilled the essential objects of its reservation to the State it has also reached the boundaries of its legitimate exercise." Black, Constitutional Prohibitions, secs. 61, 62.

Has it not fulfilled "the essential object" in this case by fixing a maximum rate? No claim is made that this maximum rate is not a sufficient protection to the public. Upon what principle
57 of law or justice, then, can this power be invoked by the State to control contracts between its citizens which do not injuriously affect the public or any member thereof? If this legislation cannot be upheld under the police power—and, as already shown, this is virtually conceded—it logically follows that the legislature is vested with unlimited power to regulate and control the management of these corporations, solely because the constitution does not in express terms prohibit. This is a doctrine which in my judgment finds no support in authority or reason. Whether railroad companies should issue the tickets in question is a matter of little importance, but the establishment of a rule of control is of great importance. All roads issue one-thousand-mile tickets; some issue these family tickets and some issue one-thousand-mile tickets upon which any number of passengers may ride. When the police power is set aside the door is open to the legislature to prescribe contracts of all kinds. This is well stated in the opinion of the circuit judge. A somewhat extended discussion of the question is therefore appropriate.

The general rule is not questioned that "the authority of courts of justice to declare void any legislative enactment must be found

in express constitutional provisions limiting legislative power." Text writers and courts have recognized that this rule has its exceptions, and that there are implied as well as express inhibitions. The learned author, Justice Cooley, after stating the general rule, says, "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. * * * The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered any grant or apportionment of power which the people in general terms have made to those departments." Cooley's Con. Lim., 174–'5.

58 In the early case of Calder *v.* Bull, 3 Dall., 386, the Supreme Court of the United States said: "I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State. The people of the United States erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it; the nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the Federal or State legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property, for the protection whereof the Government was established. An act of the legislature (for I cannot call it a law) contrary to the first great principles of the social compact cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact and on republican principles must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act which when done was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that make a man a judge in his own cause; or a law that takes property from A

59 and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it cannot be presumed that they have done it. The genius, the nature, and the spirit of our State governments amount to a pro-

hibition of such acts of legislation, and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may declare new crimes and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong; but they cannot change innocence into guilt or punish innocence as a crime or violate the right of antecedent lawful private contract or the right of private property. To maintain that our Federal or State legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in our free republican government."

In Durkee *v.* Janesville, in discussing the power of the legislature to exempt the city of Janesville from the payment of costs in tax cases brought against the city when the city was defeated, the court said that they "care very little whether it is placed on those fundamental principles of law and justice which in our form of government it has been held no legislative body can override, even though not prohibited by the written Constitution, or upon the provisions of the Constitution itself, some of which clearly forbid the enactment of such laws." 28 Wis., 467.

These two cases were cited with approval in a unanimous opinion by this court: Wilder *v.* R'y Co., 70 Mich., 382; see also Park *v.* Free Press Co., 72 Mich., 560.

In the noted and leading case in this State of People *v.* Salem, 20 Mich., 452, it was vigorously urged by two eminent lawyers that the power of the legislature to authorize municipalities to pledge their credit for the construction of railroads was not expressly inhibited by the Constitution, and therefore must be held to exist. The court took the opposite view, and in the majority opinion, written by Justice Cooley, said: "There are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words"—p. 473.

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It may be proper here to remark that that case held that "railroads are no longer public works, but private property. Individuals and not the State own and control them for their own profit. The public may reap many and large benefits from them, and, indeed, are expected to do so, but only incidentally and only as they may reap similar benefits from other modes of investing private capital"—p. 485. See also page 489 of the same case.

Justice Christiancy, a learned jurist, said in People *v.* Mich. Plank Road Co., 9 Mich., 306, "Powers, the exercise of which can only be justified on this specific ground (the police power), and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort, or well being of society or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the

particular case, notwithstanding the language of the prohibition would otherwise include it."

Now, let us apply to the present case the rule given by Mr. Justice Cooley that the "regulation must have reference to the comfort, safety, or welfare of society." Certainly it does not affect or promote the comfort or safety of society or any member of it. The learned counsel say, "Its apparent object is to promote the convenience of persons having occasion to travel." In what way does it promote this convenience? It can promote the relator's convenience only by permitting him to buy one ticket instead of two or more. This is too trifling a convenience to deserve consideration.

I am not aware of any decision holding that mere convenience is a test for the exercise of the police power, but if it were the law would not regard the purchase of one ticket instead of two or more a public convenience. Counsel further say, "It brings the reduction of rates of two cents per mile within the reach of all persons who may have occasion to make infrequent trips." Do those "who have occasion to make only infrequent trips" constitute the general public? The provision is not for the benefit or convenience of those who travel on business, for it is the universal custom of railroads to issue one-thousand-mile tickets to individuals. Obviously, it will not benefit the great mass of the people, few of whom would expend $20 or $25 at one time on a ticket. The sole benefit is a pecuniary one to the rich and well-to-do, who would purchase such tickets for visiting or pleasure. Counsel do not appear to seriously claim that the requirement comes within the rule above stated, but rest their contention upon the broad proposition that the legislature may absolutely control the management of railroad corporations because they are engaged in a public business—that is, a business in which the general public are interested. The argument that this requirement of the statute is essential to "the comfort, safety, or welfare of society" refutes itself and cannot be sustained upon the principle of inherent police power.

The argument of counsel logically leads to the conclusion that the legislature may manage and control the business of the railroads of this State just as fully and completely as it could if the State owned them. The State did once own three railroads, of which the respondent was one, and managed them. It did not make a success of the business and sold them to private parties. Is it possible to hold that the State, by implication, reserved the exclusive right to manage, direct, and control them, and determine what contracts they should make, and then that the courts should determine whether they were reasonable? No such reservation is found in the articles of sale or in any law of the State under which other roads have been constructed. Upon what principles can courts read such reservation into the law? Neither legislatures nor judges are experienced in the business of running railroads. Why should the former be authorized to make contracts for them and the latter to determine their reasonableness when such contracts have no "reference to the comfort, safety, or

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welfare of society"? The property of railroads is private property. Neither the State nor the public has a penny invested in them. Private capital has contributed every dollar to their construction and equipment. Their owners have built them for private profit and not as public benefactors; otherwise the Salem case was wrongly decided. Railroad companies are common carriers pure and simple. They are not public corporations in the sense that municipal corporations are public. They are termed quasi-public corporations only because the general public may deal with them, and are entitled to have themselves and their goods carried by them, and are therefore subject to those regulations which are necessary for the protection of the public. This proposition is well stated in the opinion of the learned circuit judge above quoted. The mere fact that the constitution and the statute have given these common carriers the power to obtain a right of way over private property by agreement or condemnation does not confer upon the legislature the power to control their management as if they were the sole property of the State. Individuals in their natural capacity may build a railroad over their own lands and over the lands of others, where by agreement they obtain the right of way, and may hold themselves out to the public as common carriers of freight and passengers. The public would have the same right in such a common carrier as they would have in a corporate common carrier organized under the general laws of the State. The fact that a right of way may be condemned for the benefit of the common carrier as well as for the public cannot logically be held to make such common carrier a strictly public corporation, over which the legislature has the same control as it has over municipal corporations or over its own property. Article XV of the constitution treats of corporations. Section 9 authorizes corporations
63 other than municipal to take private property for public use—that is, a use in which the public have a public interest and in which the private corporation has a private interest. Section 15 authorizes municipalities to take private property for public improvements. Section 14 of article XVIII authorizes the taking of land for private roads.

We need not discuss to what extent these provisions involve the exercise of the power of eminent domain. "Eminent domain is the right or power of a sovereign State to appropriate private property to a particular use for the purpose of promoting the general welfare." Lewis, Em. Domain, sec. 1, 6 Am. & Eng. Enc. of Law, 511.

In its original and strict sense it implies that the State takes the land and compensates the private person for his damages. Grotius wrote, "When this is done the State is bound to make good the loss to those who lose their property." It is now universally held that this right may be delegated to private parties, corporate or individual; but I submit that such delegation to private parties does not take away from them all their common-law rights and vest them in the State, subject to the judgment of courts as to the reasonableness of the control exercised by the State.

It follows that the inherent power in the legislature to fix rates of carriage by railroads is based upon precisely the same principle as is the power to fix the rates to be charged by all common carriers, such as hackmen, ferrymen, and other carriers of persons and of freight. No one would contend that the legislature could require hackmen or ferrymen or owners of omnibuses to enter into contracts with their patrons to carry them for two years at a rate below the amount otherwise fixed by law, or that they should carry married men and their families at reduced rates.

The legislature of Illinois passed a law fixing a maximum charge for elevating and storing grain. The law was attacked as unconstitutional, but was sustained by the Supreme Court of the United States upon the ground that the public had an interest in
64 the business, and it was therefore subject to the control of the legislature, so far as fixing the rates was concerned, thereby protecting the public from exorbitant charges. Munn *v.* Illinois, 94 U. S., 113.

The same principle is the basis for the exercise of the police power in regard to railroads, elevators, hacks, ferry-s, etc. If the legislature does not possess the power in the one case to compel the party, whether natural or artificial, to enter into contracts for the future, neither does it in the other. This subject is so fully and exhaustively treated in both the majority and minority opinions in that case that I will not discuss it further; but for the purpose of showing the basis upon which courts have sustained the legislative power to fix maximum rates, I quote the following from the majority opinion:

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by common laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private—Thorp *v.* R. B. R'y Co., 27 Vt., 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his property as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non lædas.* From this source came the police powers, which, as was said by Mr. Chief Justice Taney in the License cases, 5 How., 583, 'are nothing more nor less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one toward another and the manner in which each shall use its own property, when such
65 regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers,

inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

The opinion cites Auldmut *v.* English, 12 East., 527, in which was involved the right to charge arbitrary rates for storage, and quotes from the opinion in that case as follows: "But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and in case of its dedication to such a purpose as this the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

The act, moreover, seriously interferes with the power of subsequent legislatures to change and increase the maximum rate should the financial condition of the railroad companies appear to demand it. Thousands of contracts would undoubtedly have been made which would run two years after the act of a subsequent legislature increasing the rate. It is, furthermore, obvious that parties acting upon the probability of a repeal of the previous law and the enactment of another increasing the rate would purchase tickets by the thousand. The legislature could not annul the contracts made under the prior law. A contract valid when made is valid till executed, and the legislature could not annul it. If they make these contracts to extend over two years, I see no reason why they may not be made to extend over 4, 8, or 10, nor do I see any grounds upon which courts could hold them unreasonable. It can make no difference whether a contract is entered into voluntarily or by a provision of the law; they are equally valid and binding. The State cannot direct that to be done which it could not do itself were it engaged in the business. If this railroad were owned by the State, as it once was, and the State should make such contracts extending over two or
66 more years, it would be held to the fulfillment of its contracts even if it were dishonest enough to attempt to repudiate them.

It is immaterial that some railroad companies have issued tickets of the kind provided by this act, or that the respondent has issued one-thousand-mile tickets to single individuals. The power of the legislature is not to be tested by the voluntary acts of the parties over whom control is sought to be exercised. Because common carriers have made contracts with their patrons, the legislature is not therefore authorized or justified in enacting that such contracts shall be made. The same rules of construction must apply as would be applied if a thousand-mile ticket had never been issued and the legislature were attempting for the first time to compel their issuance. If the legislature possessed the power to so enact, subject to reasonableness, the fact that such contracts had been voluntarily made would be evidence of the reasonableness of the law compelling them, but it is of no force whatever in determining whether the power exists. Probably all railroad companies have issued excursion tickets at less than a cent a mile and valid for a few days. Does this fact authorize the legislature to enact that such companies must give these excursions, and to determine how often, at what

rate, and the time within which the tickets shall be good for passage? Is this within the constitutional power of the legislature, either express or implied, to protect the public from extortion by fixing reasonable maximum rates?

The opinion of the court below should be affirmed, but its judgment was erroneous and should be reversed and the petition dismissed with the costs of both courts.

C. B. GRANT.

67 Supreme Court of Michigan.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

I concur in the conclusion reached by my brother Grant. Our constitution, adopted in 1850, provides that "the legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State, and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies owning connecting or intersecting lines of railroad." Constitution of Michigan, article XIX*a*, section 1.

Acting upon this authority, the legislature fixed a maximum rate per mile for the transportation of passengers which the railroads might charge. The first attempt to do more was by an act which recognized the short haul and allowed a higher rate per mile for short distances than for long. It is now proposed by the act under consideration to discriminate in favor of the passenger who shall purchase transportation in large quantities by giving him a lower rate, and to give special advantages to men of family. Will the next step be a law requiring the sale of transportation for freight at a reduced rate to large shippers?

Without discussing the propriety of discrimination by the railroad companies, based upon competition and common business principles, we may well doubt the validity of legislation requiring it. The interstate-commerce act seems to have been designed to prevent the very thing that this law requires. I have doubts of the
constitutionality of legislation which does more than to assure
68 to any person the right of carriage upon payment of the ordinary lawful fare.

Under the constitution our legislature may fix a maximum rate, and while the question of discrimination growing out of the long and short haul was not discussed, the validity of such legislation may be settled by the Wellman case, 143 U. S., 339.

I am of the opinion, however, that the legislature has no power to say that a ticket shall be sold to one man cheaper than to another, or that it shall have a broader effect, and therefore a greater value, to one than to another, depending upon a willingness to purchase the right to transportation in large quantities, or upon the fact that

the purchaser has a family. It might as well be made to depend upon his age, occupation, poverty, or necessity as upon his ability to purchase in quantities or to have and support a family.

Again, the word maximum cannot be ignored. It has some use in the constitutional provision. To my mind, it excludes the power of discriminatory legislation, leaving it to the railroad companies to make lawful concessions to their patrons as their business interests may require or permit.

FRANK A. HOOKER.

69 At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the second day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

HENRY C. SMITH, Relator,
vs.
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Appellant.

In this cause an application for a rehearing is duly submitted.

70 STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

Application of Respondent for Hearing.

To the honorable the supreme court of Michigan:

The respondent, The Lake Shore and Michigan Southern Railway Company, above named, respectfully prays that a rehearing of the above-entitled cause may be had in this court for the reasons appearing in the accompanying statement.

ASHLEY POND,
A. C. ANGELL AND
C. E. WEAVER,
Attorneys for Respondent.
GEO. C. GREENE, *Of Counsel.*

71 STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

To the honorable the supreme court of the State of Michigan:

The respondent insists that a rehearing should be granted by the supreme court, because, as appears by the opinion of the majority of the court, the principal contention of the respondent, upon which it claimed the act of 1891 was repugnant to, inconsistent with, and in violation of the constitution of the State of Michigan, was entirely overlooked or ignored by the majority of the court, and was not referred to or in any manner answered.

In the opinion it is said:

"Fourth. It is contended that the amendment to the constitution, article 19*a*, sec. 1, is a limitation upon the power of the legislature to legislate as to rates and charges of transportation, and limits the right in that regard to the fixing of maximum rates, and that the provision for the issuing of a mileage book is not a fixing of maximum rates of charge, but is a further regulation."

And again:

"The contention is that this section is a limitation upon the authority of the legislature, and that as to the fixing of rates the power is exhausted when maximum rates are established, and that the act in question is not a fixing of maximum rates within the constitutional provision."

The "contention" thus stated by the court is the only one
72 based on the State constitution which the court states, mentions, or discusses.

While it is true that incidentally it was claimed by respondent, as one reason why the act should not be upheld, that "the express provision of the constitution conferring upon the legislature power within definite limits over the matter of rates to be charged by railroads implies an exclusion of all other powers over the same subject," yet that was not the principal ground stated in briefs or orally argued at length against the constitutionality of the act.

The contention of the respondent was stated at pages 5, 6, and 7 of my brief to be—

"That so much of the act in question as requires the railroad companies to issue tickets good for transportation of the purchaser and his family for two years at a rate of fare of two cents per mile, being one cent a mile below the maximum rate, is—

First, repugnant to the constitution of this State, which declares that the legislature may from time to time establish maximum rates."

"The act of 1891 is inconsistent with, repugnant to, and in violation of the above constitutional provision, and if upheld will to a

certain extent disable future legislatures from exercising the power conferred by the constitution.

"I insist that the legislature has no power to require a railroad company to enter into a contract the effect of which may be to deprive the company of the constitutional right to have maximum rates in all cases established from time to time or modified at any time the legislature may see fit to act.

"The power to require corporations to enter into executory contracts with its patrons, binding it to perform certain service for a term of years at a fixed price or rate, conflicts with and vastly exceeds the power to simply establish maximum rates from time to time.

"It was evidently contemplated when the constitutional
73 amendment in question was considered and adopted that circumstances would require changes from time to time in established maximum rates, and that that power was to be exercised by the legislature from time to time, as circumstances and conditions might require.

"But by this act the legislature of 1891 would deprive the railroad companies of the right to obtain legislation to increase the rates or of the people to obtain reduction in rates in cases where the mileage tickets had been sold, although the situation might be such as to demand such increase or reduction."

This certainly goes much farther than to merely claim that the "section is a limitation upon the authority of the legislature, and that as to the fixing of rates the power is exhausted when maximum rates are established."

In support of our contention that the provisions of the act in question were repugnant to, inconsistent with, and in violation of the constitution, and not that the legislature was limited in its power to the fixing of maximum rates, the following argument appears in the brief filed by me, at pages 8, 9, 10, 11, 15, 16, 17: Suppose the act of 1891 in force in 1897, when the legislature will next be in session, and circumstances such that it was evident rates should be not less than three cents a mile in any case, and the legislature was about to amend the act of 1891 and increase rates and repeal the mileage-ticket provision; at any time prior to the taking effect of the amendment or repeal, demands could be made, under the law of 1891, upon every railroad company for an unlimited number of mileage tickets, which the companies must sell, good for two years thereafter, and it would not be within the power of the legislature to afford any relief, because it can pass no law impairing the obligation of contracts, and the tickets are contracts. The ticket-purchasers could for two years use their mileage tickets, and the legislature could not from time to time establish the rates.

The constitution vests in the legislature power at any moment
to increase or reduce rates instanter, and the act of 1891
74 would deprive it of that power. If this act is upheld, it must follow that the legislature has power to require railroad companies to enter into contracts with shippers to transport their freight for a term of years to come, without limit, at a fixed rate,

and the companies would be bound by their contracts, although before the expiration of the contract period the rates were greatly increased.

The companies may voluntarily enter into contracts for transpor-ation of persons and property, running for such time as may be agreed upon, keeping within the rates fixed by law and not unjustly discriminating, but they cannot be compelled to enter into such contracts. They discharge their whole duty imposed by law when, upon payment of the established rate or fare, they receive and in due season transport the person or property to its destination. What today may be a reasonable rate may a year from now be unremunerative, and there is no power in one legislature to so establish rates or fares in any case, or as between any individual and any company, so that it or a subsequent legislature may not at any time and from time to time change them.

The effect of the act, if valid, would be to compel the railroad company to bind itself by contract with individuals not to avail itself of the benefits of the constitutional provision conferring upon the legislature the power to from time to time establish rates.

Suppose the legislature should enact that the maximum rates and fares upon railroads should forever hereafter, or for a term of years, be as stated in the act, would such an act be upheld and future legislatures be powerless to act? or, if it enacted that upon application of the shipper the company should enter into a contract with him that upon receiving a certain rate it would transport his property for a term of years, would the law be valid and the company be bound by it to enter into such contracts, so that it could not as to the contracting shippers have the benefit of an increased rate established by a subsequent legislature?

In principle there is no difference between such legislation
75 and the act in question.

Again, suppose this proceeding be sustained, and in obedience to the writ of mandamus the respondent issues to relator and his wife the ticket or tickets he may demand, and the next day the act of 1891 should be repealed, and the legislature should restore the fare to three cents a mile in all cases; the company, under its contract, the ticket, would be obliged to carry the relator and his wife for two years at two cents a mile, while his neighbor, who failed to secure tickets before the repeal, would have to pay three.

In order to warrant the legislature in producing such results the constitutional provision should be amended so as to authorize the legislature to establish not only maximum, but minimum and discriminative rates for transportation of passengers, and to require railroad companies to enter into contracts to carry at specified rates for a term of years.

The learned judge in delivering the opinion in this case in the court below, although he declined to decide the constitutional question involved, well said: "This particular provision of the statute, the aid of which is invoked in this case, if constitutional, would seem almost to extend the police power of this State to the practical management of the business of the railway companies and leave no

line beyond which it could be said the State cannot assume to control what are practically the private business affairs of the corporation."

It certainly cannot be seriously contended that this provision of the statute is within the "police power of the State."

The proposition under consideration was controverted by counsel for the relator in the briefs filed in the court below; but he conceded that if he was right in his contention, then the legislature can require the companies to make executory contracts, to be performed in the future, running for a period of ten, twenty, or thirty years, modified only "by the condition that the time fixed must always be within the bounds of reasonable discretion," or "provided
76 such period is not beyond the bounds of reasonable legislative discretion."

He also conceded that if he was right, the legislature can compel companies to make express contracts running into the future for the transportation of freight, and that "such power is only limited by the bounds of reasonable legislative discretion."

This is equivalent to declaring that the legislature has absolute and unlimited power to require companies to enter into such contracts for such rates and periods of time as to the legislature shall seem reasonable. A more despotic or arbitrary power it is hard to conceive.

If the legislature have the power or it is within the scope of their powers to require the execution of such contracts, then the legislature is to be the judge of what is reasonable, and the courts are powerless to review their exercise of that power or discretion.

See Sedgwick on Statutes and Constitutional Law, pp. 155–'9.
Cooley, Const. Lim. (6th ed.), pp. 52–55.

The relator's counsel brings to his support the principle that "the legislature has all the incidental and instrumental powers necessary and proper to carry into effectual execution all the express powers," but he does not tell us how or why it is necessary, in order to "establish maximum rates from time to time," to require that the companies must enter into contract to adhere to such rates for a term of years, regardless of what maximum rates fixed by the legislature may be from time to time during the term.

By the first part of the act in question the legislature establish maximum rates, but by the provisions in question, which follow, it requires the companies to accept less than the maximum rate and imposes in addition burdensome conditions upon the companies.

The relator's counsel said we do not "specify any clause of the constitution which expressly prohibits the making of such a law by the legislature." I insist that the act is inconsistent with and in violation of the provision of the constitution which gives to
77 railroad companies the right at any time and from time to time to invoke legislative action, and gives the legislature power to act in the matter of establishing maximum rates to take effect at once, unfettered by contracts involuntarily entered into under legislative compulsion.

Judge Cooley, p. 105, Const. Lim. (6th ed.), says: "Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision."

The requirement that the corporations by contracts shall establish rates for a term of years would certainly disappoint and frustrate the exercise by the legislature of the power given it by the constitution to establish maximum rates at any and all times.

Every legislative body, unless restricted by the constitution, may modify or abolish the acts of its predecessors. There is no way in which a legislative act can be made irrepealable, except it assume the form and substance of a contract.

3 Enc. of Law, 691, citing Cooley, Const. Lim., 125.

Here the legislative body by the act in question deprives the subsequent legislature of this power by requiring the corporations to enter into contracts, which, so far as parties hereto are concerned, would render any subsequent act of the legislature inoperative, as it is beyond its power to impair the obligation of contracts.

"The inhibitions of the constitution as to legislation are equally effective when they arise by implication as by expression, and this is the case when the legislative provision is repugnant to some provision of the constitution."

Page *v.* Allen, 58 Pa. St., 338; 98 Am. Dec., 272.

"Expression of one thing in constitution is necessarily the exclusion of things not expressed, and this is especially true of constitutional provisions declaratory in their nature."

Id., 58 Pa. St., 338; 98 Am. Dec., 272.

In Commonwealth *v.* Maxwell, 27 Pa. St., 444, it was held:

"A law that is unconstitutional is so because it is either an assumption of power not legislative or because it is inconsistent
78 with some provision of the Federal or State constitution."

In Hanson *v.* Vernon, 27 Iowa, 28 (1 Am. Rep., 215), Dillon, J., says:

"It is well-settled principle of American constitutional law that an act of the legislature may be unconstitutional in two ways: 1st, because it assumes or seeks to confer power not legislative in its nature; or, 2d, because it violates some specific provision of the State or national Constitution." Citing 27 Penn. St., 444; 30 *id.*, 9–37; Sedgwick, Const. Law, 174–'5, 515; 4 Hill, N. Y., 140.

In the brief of Mr. Pond, used in the court below, a copy of which was filed with this court appended to my brief, he said (page 65):

"It is certain that that provision is inconsistent with any power in the legislature to 'establish reasonable maximum rates,' except 'from time to time.' In other words, it negatives the power of the legislature at any session from establishing maximum rates, which it shall be beyond the power of the legislature at its next or any other session to change; yet the statute in question, if held valid, will indirectly accomplish this result. It in effect says that for two

years from any day before such statute is repealed or changed the maximum rate for the transportation of any passenger who elects to pay for that time in advance shall be two cents per mile; and, as my associate pointed out in his argument, if an act should at any time hereafter be introduced into the legislature to increase such maximum, thousands of people might require such maximum to continue as to them for two years after such act should be passed and take effect. In other words, the effect of the act is to fix a maximum charge for two years from any given time in favor of all persons demanding it."

I respectfully submit that the point made by respondent that the act is repugnant to, inconsistent with, and in violation of the State constitution has not been answered by briefs of counsel or the opinion of the court, and as the question is a most important
79 one, and has been fully and fairly presented, fully argued and submitted, it is no more than right that it should be squarely decided one way or the other.

I therefore respectfully ask the court to reconsider the case and give to the question presented the careful consideration it deserves.

GEO. C. GREENE,
Of Counsel for Respondent.

By Mr. POND: I desire to add only a few words to what has been said above by my associate, Mr. Greene.

The opinion of the majority of the court discusses the effect of article XIX*a* of the constitution wholly upon the assumption that the sole contention made by counsel for respondent upon that subject was that said section is a limitation upon the power of the legislature, and that its effect is to preclude the legislature from establishing different maximum rates for different circumstances and conditions.

With all due deference, I submit that in this respect the court is in error. No argument of that kind will be found in either of the briefs of the undersigned which were before the court.

Said section is either a grant of power or, as suggested by the quotation contained in the opinion of the majority of the court from Judge Cahill in the Wellman case, "a declaration of an existing power." Whether it is the one or the other was not material to my argument, and hence received no attention from me.

My contention was and is that the act in question must or may interfere with and embarrass future legislatures in the effectual exercise of such power, and hence that said act must be invalid.

That an enactment by one legislature which by its operation must or may restrict or embarrass a subsequent legislature in the exercise of a power vested in the legislative department of the government must be invalid seemed to me when I wrote my
80 briefs mentioned, and seems to me now, too clear to need argument; and hence in such briefs I attempted to demonstrate, and believe I did demonstrate, that the statute under consideration was such as would necessarily embarrass a future legislature in the exercise of the power so given or declared to exist by

said section XIX*a* of the constitution. My argument there is substantially this, to wit, that a subsequent legislature exercising such power may raise a maximum rate prescribed by a former legislature, and it must be presumed it will do so if satisfied that such a rate is unjustly too low; and that the statute in question would operate to embarrass such exercise of such power is clear, for the reason that it compels railroad companies to enter into contracts to carry at a named rate for a period of two years from any given date, say from the day before such increase in the maximum rate takes effect. (See quotation from my brief by Mr. Greene, *supra.*)

It is no answer to this argument to say that no such contracts may be outstanding. In the very nature of things, they will be outstanding. The moment it seems probable that the rate fixed by such act is to be raised or such act repealed, it goes without saying that railroad companies will be called upon to make such contracts; nor is it any answer to say that there is slight, if any, probability that a future legislature will desire to raise such rate or repeal such act. The question is not what is probable; that rests in the womb of the future, and no one can forecast it. It is enough that the power exists, and that the act in question would interfere with its exercise.

Now, I respectfully submit that this argument cannot be characterized as frivolous, and that it demands consideration.

ASHLEY POND,
Of Counsel for Respondent.

80½ STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
vs.
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

Application of Respondent for Rehearing.

LENAWEE COUNTY, *ss:*

Clement E. Weaver, being duly sworn, deposes and says that he is one of the attorneys for respondent in the above-entitled cause; that on the 13th day of October, 1897, at the office of the clerk of the supreme court, he served upon Fred A. Maynard, attorney general of the State, a printed copy of application of respondent for rehearing in this cause by handing the same to him personally.

And deponent further says that on the 14th day of October, 1897, he served a copy of said printed application upon Henry C. Smith, relator, and one of the attorneys of record of said relator, by handing the same to him personally, in the office of Watts, Bean & Smith, in the city of Adrian, attorneys for relator.

C. E. WEAVER.

Subscribed and sworn to before me this 14th day of October, A. D. 1897.

D. B. MORGAN,
Notary Public in and for Lenawee County.

81 (*Reply to Application for Rehearing.*)

STATE OF MICHIGAN :

Supreme Court.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

In the matter of the application of respondent for a rehearing.

We have read with care the respondent's application, and while it does not contain any point not discussed in their brief and replied to in the brief of the relator, we have no reluctance in making some comments and further reply.

The tone of respondent's application would indicate that the learned counsel took it as a personal affront that every one of their points or alleged points have not been taken up and discussed by the court in detail; and they also assert with characteristic positiveness that neither the court nor counsel for relator have made any answer to certain of their propositions, and especially to the one that future legislatures will be tied up and prevented from again changing the maximum rate by the act in question.

We refer the counsel for respondent and the court to our brief on file, pages 52, 53, 54, 55, 56, 57, and 58, for some comments upon this branch of their contention. We also call their attention to our brief, pages 38 to 52, for the discussion of the principles underlying the right of State legislature to pass laws for the control and management of railway corporations, subject only to the requirement of the Constitution that the legislation shall be so
82 reasonable as not to deprive a corporation of the benefit and use of its property; and in this connection we wish to repeat that when the legislature has once acted and declared that certain enactments are useful and beneficial to the general welfare and public interest, that such declaration and conclusion on the part of the legislative branch is conclusive upon the judiciary, and that the judiciary cannot interpose except that such law violates the fundamental principles of government by depriving the individual of some of his inalienable rights, such as life, liberty, the pursuit of happiness, the right of property, and the beneficial use of property, and before the court has a right to interpose it must find affirmatively that the act in question does go to that extent. The judiciary cannot call upon the legislature or the party seeking to enforce the law to point out specifically the particular good to be accomplished by the act in question.

The main point.

But, to return to the main point urged by counsel for a rehearing, we say that the act in question does not prevent such legislature from "time to time" changing the maximum rate and altering and amending the act in question. Indeed, it is not contended but that the rate may be changed by subsequent legislatures as to all tickets sold after the new act takes effect; but it is insisted that if it is attempted to be made to apply by its terms to outstanding tickets, that it will be in violation of the constitution, which forbids the impairing of the obligation of contracts.

It will hardly be disputed, and has not been, but that the legislature might pass a law and exempt from its operations all outstanding tickets; but it is insisted that this will leave one class of tickets with a right to ride at the rate of two cents per mile and another at a greater rate in case the rate increased, and that that will be discriminating. We deny that this will be a law authorizing discrimination in rates, and deny that it will be discrimination; but even if it does discriminate and works injury to certain parties and certain railway companies, still it would fall within the quotation made
83 by us in our former brief, found on page 56, bottom, and 57, top. We again call the court's attention to our suggestion made on page 56 of our brief, in the following language:

"But suppose a change in legislation should be made increasing the rate, and that when it took effect tickets were outstanding. Such tickets would not be voluntary contracts of the railroad company in all respects. The regulations and conditions injected by the direction and command of the legislature would not be the voluntary contract of the railroad company, and it is by no means certain that the legislature, which may increase the rate, might not, at the same time, make provision for the redemption of all outstanding tickets that would be equitable, and yet not compel railroad companies to carry the unused portion of them at the former rate of two cents per mile, without violating that provision of the constitution which prohibits the passing of laws 'impairing the obligations of contracts.'"

After writing the foregoing we found some authorities which seem to us to sustain this contention. We noted them upon the margin of our brief filed, and again refer to them here, viz:

Mumma *v.* Potomic Co., 8 Peters, 281.
Chicago Life Ins. Co. *v.* Needles, 113 U. S., 575.
Crenshaw *v.* U. S., 134 U. S., 99.

It seems to us that every purchaser of a ticket under this act in question purchases it subject to the right of the legislature, when it sees fit, to raise the maximum rates and fix some fair method of outstanding tickets being redeemed without any loss to the holder for the unused portion thereof.

It was held by the three cases above cited that a public law which enters into a contract between private individuals, which is expressly injected into the contract by the public law itself, and not by the voluntary agreement of the parties, is not such a contract as the con-

stitution refers to when it forbids the passing of laws impairing the obligation of contracts.

" In all these cases there can be no contract and no irrepeal-
84 able law, because they are governmental subjects, and hence within the category before stated. They involve public interests, and legislative acts concerning them are necessarily public laws. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessor. The latter has the same power of repeal and modification which the former had of enactment; neither more nor less. All occupy in this respect a footing of perfect equality. This must necessarily be so, in the nature of things. It is vital to the public welfare that each should be able at all times to do whatever the varying circumstances and personal exigencies touching the subject involved may require. A different result would be frought with evil." Grenshaw *v.* U. S., *supra*, p. 106.

So we say that when the legislature assumes the right to say that a railway corporation shall sell to its patrons a ticket for twenty dollars over one thousand miles of its road and fixes the limit within which it may be used, and does this acting in behalf of the public, as a public matter, the purchaser buys it, taking notice that any subsequent legislature may again change the general maximum rate for such a ticket and at the same time fix some just method of adjustment between himself and the railway company for the redemption of the outstanding part of his ticket without loss to him.

And we insist that the taking away of his future right to the reduced rate which the statute had given him is not impairing the obligation of his contract, both acts of the legislature being based upon the public welfare.

If we keep constantly in mind the fact that this legislation is the public interest, the regulation of public business, there is no difficulty in the matter.

If we keep close to the opinion of Justice Brewer in Budd *v.* N. Y., 143 U. S, cited by us in our former brief, there will be no trouble in disposing of the case.

Justice Brewer says: " The creating of all public highways is a public duty. Railroads are highways. The State may build
85 them. If an individual does the work, he is *pro tanto* doing the work of the State. He devotes his property to the public use."

WATTS, BEAN & SMITH,
Attorneys for Relator.

85*a* STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
vs.
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

Respondent in this cause asks the court to make the following a part of its decree and order of judgment in the above-entitled cause:

The court orders it to be certified and made a part of the record in this case, and of the order and decree granted herein, that in the decision of this case and rendition of said order and decree it became and was necessary and material to the case to determine whether the act of the legislature of the State of Michigan mentioned in the petition herein, being subdivision 9 of section 9 of article II of the general railroad laws of the State, as amended by act No. 90 of the public acts of 1891, is in violation of or repugnant to article XIV of the Constitution of the United States, which provides: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and also whether said act of the legislature is in violation of or repugnant to the eighth section of article I of said Constitution, which declares that "The Congress shall have power * * * to regulate commerce among the several States;" and also whether said act of the legislature is repugnant to and in violation of article I, section 10, of the Constitution of the United States, which prohibits the State from passing any law impairing the obligation of contracts, it being claimed by the respondent company that said act, if enforced
85*b* against said respondent, would impair the obligation of the contract between the State and the Michigan Southern Railroad Company as embodied and expressed in the charter of the last-mentioned company. The respondent company claimed that the said act was in violation of and repugnant to the said several provisions of said Constitution, but this court held and decided herein against the said several claims so made by said respondent."

Dated October 7, 1897.

ASHLEY POND,
A. C. ANGELL AND
C. E. WEAVER,
Attorneys for Respondent.
GEO. C. GREENE, *Of Counsel.*

We consent.
WATTS, BEAN & SMITH,
Attorneys for Relator.

Endorsed: Filed November 2, 1897. Chas. C. Hopkins, clerk supreme court.

86 STATE OF MICHIGAN:

The Supreme Court.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

In the matter of the application for a rehearing.

Statement of the Attorney General.

The respondent has applied for a rehearing of this cause. I submit that the opinion of the court rendered upon the hearing, the briefs on the part of relator on the hearing of the case, and the statement of Watts, Bean & Smith, filed in answer to said application for a rehearing, fully answer the points raised and discussed in respondent's application, and that said application should be denied.

Respondent has filed a request in this cause that the court incorporate in its decree and order of judgment the following:

"The court orders it to be certified and made a part of the record in this case and of the order and decree granted herein, that in the decision of this case and rendition of said order and decree it became and was necessary and material to the case to determine whether the act of the legislature of the State of Michigan mentioned in the petition herein, being subdivision 9 of section 9 of article II of the general railroad laws of the State as amended by act No. 90 of the public acts of 1891, is in violation of or repugnant to article XIV of the Constitution of the United States, which provides: 'nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law-;'

87 and also whether said act of the legislature is in violation of or repugnant to the eighth section of article 1 of said Constitution, which declares that 'the Congress shall have power * * * to regulate commerce among the several States;' and also whether said act of the legislature is repugnant to and in violation of article 1, section 10, of the Constitution of the United States, which prohibits the State from passing any law impairing the obligation of contracts, it being claimed by the respondent company that said act, if enforced against said respondent, would impair the obligation of the contract between the State and the Michigan Southern Railroad Company, as embodied and expressed in the charter of the last-mentioned company. The respondent company claimed that the said act was in violation of and repugnant to the said several provisions of said Constitution, but this court held and decided herein against the said several claims so made by said respondent."

Clearly, under the practice of this court, this clause does not and cannot properly form a part of the decree and order of judgment, and I therefore respectfully request that such clause be not made a part of such decree and order of judgment herein.

If respondent believes that there is a Federal question or questions involved in this case, and that this court has acted adversely to its claims upon said Federal question or questions, it is for it to present the matter to the Federal court, and to allow that court to determine as to whether or not such Federal question or questions was actually and necessarily involved and decided adversely to respondent's claims. It is not the practice of this court to assume the existence of such Federal questions, and to make them a part and portion of its decree and order of judgment.

The practice of this court has been in this class of cases to issue its decree and order of judgment in the ordinary form, and not to include therein clauses which state that a Federal question was raised and actually and necessarily decided.

This practice clearly appears from the cases of Detroit City Railway *v.* Guthard, 51 Mich., 180 (114 U. S., 133), and Fargo *v.*
88 Michigan, 57 Mich., 598 (reversed in 121 U. S., 230).

In the case of Detroit City Railway *v.* Guthard the attorneys for complainant and appellee moved the court for a certificate stating that the record in the case presented a Federal question, the decision of which was necessary and material to the issue presented and decided. The court in that case refused to make such a certificate.

Also in the case of Fargo *v.* Michigan the files disclose that the complainant moved the court for a decree stating that a tax of the State had come into question as violating a right, privilege, or immunity of the complainant under the Constitution of the United States, and that the opinion of the court was that said tax did not violate any right, privilege, or immunity of the complainant company. The court refused to incorporate such a clause in the decree, following the ruling in the case of Detroit City Railway *v.* Guthard.

I therefore submit that under the practice of this court as laid down in the two cases last above mentioned the clause contended for by the respondent should not be included in the decree and order of judgment.

Respectfully submitted.

FRED A. MAYNARD,
Attorney General.

89 At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the twenty-third day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Appellant.

The application for a rehearing heretofore submitted herein having been duly considered by the court is hereby denied, with costs to the relator.

90 At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the seventh day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Appellant.

The record and proceedings in this cause having been removed to this court by writ of certiorari issued to the circuit court for the county of Lenawee, and the same and the matters and proceedings therein having been examined and duly considered by the court and no error appearing therein, thereupon it is ordered that the order of said circuit court for the county of Lenawee, granting a peremptory writ of mandamus herein, be, and the same is hereby, in all things affirmed.

It is further ordered and adjudged that the relator recover of and from the said respondent his costs, to be taxed, and have execution therefor.

91 And upon motion of counsel for the respondent it is further ordered that it be certified and made a part of the record in this case and of the order and decree granted herein that in the decision of this case and rendition of said order and decree it became and was necessary and material to the case to determine whether the act of the legislature of the State of Michigan mentioned in the petition herein, being subdivision 9 of section 9 of article II of the general railroad laws of the State as amended by act No. 90 of the public acts of 1891, is in violation of or repugnant to article XIV of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law;" and also whether said act of the legislature is in violation of or repugnant to the eighth section of article I of said Constitution, which declares that "the Congress shall have power * * * to regulate commerce among the several States;" and also whether said act of the legislature is repugnant to and in violation of article I, section 10, of the Constitution of the

United States, which prohibits the State from passing any law impairing the obligation of contracts, it being claimed by the respondent company that said act, if enforced against said respondent, would impair the obligation of the contract between the State and the Michigan Southern Railroad Company as embodied and expressed in the charter of the last-mentioned company. The respondent company claimed that the said act was in violation of and repugnant to the said several provisions of said Constitution, but this court held and decided herein against the said several claims so made by said respondent.

92 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

[Seal of the Circuit Court, Eastern District of Michigan.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Michigan, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry C. Smith, as relator, and The Lake Shore & Michigan Southern Railway Company, as respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
93 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Lake Shore & Michigan Southern Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 13th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States
for the Eastern District of Michigan.

Allowed by—
CHAS. D. LONG,
Chief Justice of the Supreme Court
of the State of Michigan.

94 [Endorsed:] Writ of error. Filed Dec. 13, 1897. Chas. C. Hopkins, clerk sup. ct.

95 UNITED STATES OF AMERICA, *ss:*

To Henry C. Smith, of the city of Adrian, in the county of Lenawee, in the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein The Lake Shore & Michigan Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles D. Long, associate chief justice of the supreme court of the State of Michigan, this thirteenth day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

CHAS. D. LONG,
Chief Justice of the Supreme Court
of the State of Michigan.

96 STATE OF MICHIGAN, } *ss:*
Lenawee County, }

On this 18th day of December, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared before me, the subscriber, Clement E. Weaver, of Adrian, Lenawee county, Michigan, and makes oath that he delivered a true copy of the within citation to Henry C. Smith, the within-named defendant in error, to deponent well known, at the office of the said Henry C. Smith, in the said city of Adrian, on Thursday, the sixteenth day of December, A. D. 1897, and at the same time the said Henry C. Smith in deponent's presence wrote and signed the following endorsement of acceptance of service.

C. E. WEAVER.

Sworn to and subscribed the 18th day of December, A. D. 1897.

D. B. MORGAN,
Notary Public.

I hereby accept service of the within citation and acknowledge the receipt this day of a true copy thereof.
Dated Dec. 16th, 1897.

HENRY C. SMITH.

[Endorsed:] Citation. Filed Dec. 23, 1897. Chas. C. Hopkins, clerk supreme court.

97 Know all men by these presents that we, The Lake Shore and Michigan Southern Railway Company, as principal, and William H. Wells, of Detroit, Michigan, as sureties, are held and firmly bound unto Henry C. Smith, of the city of Adrian, in the county of Lenawee, in the State of Michigan, in the full and just sum of one thousand dollars, to be paid to the said Henry C. Smith, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, in the supreme court of the State of Michigan that being the highest court in said State, in a suit depending in said court between said Henry C. Smith as relator and said Lake Shore and Michigan Southern Railway Company as respondents, a judgment was rendered against the said Lake Shore and Michigan Southern Railway Company, and the said railway company has obtained the allowance of a writ of error to remove the said cause to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry C. Smith citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Lake Shore and Michigan Southern Railway Company shall prosecute its said writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void else to remain in full force and virtue.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,
By S. R. CALLAWAY, *President.* [SEAL.]
WM. H. WELLS. [SEAL.]

Sealed and delivered in presence of—

—— ——.

98 Attest: N. BARTLETT, *Ass't Sec'y.*

[Seal Railway Company.]

Approved by—
CHAS. D. LONG,
Chief Justice of the Supreme Court of the State of Michigan.

Endorsed: Filed Dec. 13, 1897. Chas. C. Hopkins, clerk supreme court.

99 In the Supreme Court of the United States.

HENRY C. SMITH, Relator and Defendant in Error,
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Plaintiff in Error.

The said respondent, by George C. Greene, its attorney, now comes into the Supreme Court of the United States, and for assignment of errors herein says that in the record and proceedings and in the judgment in said cause there is manifest error in this, to wit:

1. That the supreme court of the State of Michigan erred in holding and determining that the act of the legislature of the State of Michigan mentioned in the petition in this cause, being subdivision 9, section 9, of article II of the general railroad laws of the State of Michigan, as amended by act No. 90 of the public acts of 1891, is not in violation of or repugnant to article XIV of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

2. That the said court erred in holding as to respondent
100 that the requirement of said act of the legislature of the State of Michigan that respondent should sell tickets good for the transportation of the purchaser and his family for two years at a rate of fare of two cents per mile is not in violation of or repugnant to article 14 of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

3. That the said court erred in holding and determining that the said act of the legislature of the State of Michigan is not in violation of or repugnant to section 8, article I, of the Constitution of the United States, which declares that "the Congress shall have power * * * to regulate commerce among the several States."

4. That the said court erred in holding that the said act of the legislature of the State of Michigan in question, as applicable to this respondent, a corporation existing under a special charter granted by the State of Michigan to it in 1846, mentioned in the opinion of said court, is not in the respects wherein it affects the rights of this respondent under said charter in violation of or repugnant to article I, section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

5. That the said court erred in holding that the said act of the legislature of the State of Michigan, as applicable to that por-
101 tion of respondent's road which it holds as successor of the Michigan Southern Railroad Company, and which that company acquired by purchase from the State under and by virtue of the contract of bargain and sale contained in the special charter of

that company in 1846, is not in the respects wherein it affects the rights of respondent as to such portion of said road under said charter in violation of or repugnant to said article I, section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

6. That it appears by the record in said cause that the petition in said cause should have been denied.

7. That the judgment in said cause was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error and against the said defendant in error.

And the said plaintiff in error, for the errors aforesaid and for other errors appearing in the record and proceedings in said cause, prays that the judgment aforesaid may be reversed and held for nothing, and that it may be restored to all things which it may have lost by occasion of said judgment.

GEORGE C. GREENE,
Attorney for Plaintiff in Error.

102 [Endorsed:] No. 15585. In the Supreme Court of the United States. Henry C. Smith, relator & def't in error, *vs.* The Lake Shore & Michigan Southern Railway Company, respondent & pl'ff in error. Assignment of errors. Filed Dec. 23, 1897. Chas. C. Hopkins, clerk.

Wells, Angell, Boynton & McMillan, — for —, 704 Union building, Detroit, Michigan.

103 Henry C. Smith, Relator, *vs.* The Lake Shore and Michigan Southern Railway Company, Respondent and Appellant.	Watts, Bean & Smith. Fred A. Maynard, attorney general. Certiorari to Lenawee.	Ashley Pond, A. C. Angell, C. E. Weaver, George C. Greene, of counsel. Lane, J.

Journal.	Date.	Proceedings.
	1896.	
	May 5	Petition duly allowed by Long, C. J., filed, and writ issued, ret. May 25, 1896.
	" 13	Return filed.
	" 20	Letter of circuit judge filed.
	" 21	Stipulation for hearing filed.
	" "	Note of argument filed.
N, 370	Jun- 19	Argued and submitted.
	1897.	
O, 241	Oct. 1	Opinion filed.
" 292	Nov. 2	Application for rehearing submitted.
	" "	Proposed form of judgment filed.
	" 23	Application for rehearing denied.
O, 346	Dec. 7	Judgment entered, with costs to relator.
	" 13	Writ of error from Supreme Court U. S. filed.
	" 13	Bond filed.
	" 23	Citation, with acceptance of service, filed.
	" "	Assignment of errors in Supreme Court U. S. filed.
	1898.	
	Jan. 12	Return made to Supreme Court United States.

104 Supreme Court of the State of Michigan.

HENRY C. SMITH, Relator,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

STATE OF MICHIGAN, *ss:*

In the Supreme Court.

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor signed by the judges of said court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error with allowance endorsed thereon, the citation with acceptance of service endorsed thereon, a copy of the bond to the adverse party filed with the writ of error, and the assignment of errors in the Supreme Court of the United States.

Seal of the Supreme Court of Michigan, Lansing.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this twelfth day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. C. HOPKINS,
Clerk of the Supreme Court of the State of Michigan.

105 In the Supreme Court of the United States.

HENRY C. SMITH, Relator and Defendant in Error,
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Plaintiff in Error.

Please take notice that the record in the supreme court of the State of Michigan in the above-entitled cause has been filed in the said Supreme Court of the United States, and said cause has been docketed No. 565 for the October term, 1897; that the appearance of the undersigned has been entered as attorney of record for plaintiff in error; that the annexed is a statement of the errors on which the plaintiff in error intends to rely, and that the plaintiff in error intends to rely upon the entire record of said supreme court of the State of Michigan in the said cause and intends to request the clerk of the Supreme Court of the United States to print the whole thereof.

GEORGE C. GREENE,
Attorney for Plaintiff in Error.

106 In the Supreme Court of the United States.

HENRY C. SMITH, Relator and Defendant in Error,
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Plaintiff in Error.

The said respondent, by George C. Greene, its attorney, now comes into the Supreme Court of the United States, and for assignment of errors herein says that in the record and proceedings and in the judgment in said cause there is manifest error in this, to wit:

1. That the supreme court of the State of Michigan erred in holding and determining that the act of the legislature of the State of Michigan mentioned in the petition in this cause, being subdivision 9, section 9, of article II of the general railroad laws of the State of Michigan, as amended by act No. 90 of the public acts of 1891, is not in violation of or repugnant to article XIV of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

2. That the said court erred in holding as to respondent that the requirement of said act of the legislature of the State of Michigan that respondent should sell tickets good for the transportation of the purchaser and his family for two years at a rate of fare
107 of two cents per mile is not in violation of or repugnant to article 14 of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

3. That the said court erred in holding and determining that the said act of the legislature of the State of Michigan is not in violation of or repugnant to section 8, article I, of the Constitution of the United States, which declares that "the Congress shall have power * * * to regulate commerce among the several States."

4. That the said court erred in holding that the said act of the legislature of the State of Michigan in question, as applicable to this respondent, a corporation existing under a special charter granted by the State of Michigan to it in 1846, mentioned in the opinion of said court, is not, in the respects wherein it affects the rights of this respondent under said charter, in violation of or repugnant to article I, section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

5. That the said court erred in holding that the said act of the legislature of the State of Michigan, as applicable to that portion of respondent's road which it holds as successor of the Michigan Southern Railroad Company and which that company acquired by purchase from the State under and by virtue of the contract of bargain

and sale contained in the special charter of that company in 1846, is not, in the respects wherein it affects the rights of respondent as to such portion of said road under said charter, in violation
108 of or repugnant to said article I, section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

6. That it appears by the record in said cause that the petition in said cause should have been denied.

7. That the judgment in said cause was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error and against the said defendant in error.

And the said plaintiff in error, for the errors aforesaid and for other errors appearing in the record and proceedings in said cause, prays that the judgment aforesaid may be reversed and held for nothing, and that it may be restored to all things which it may have lost by occasion of said judgment.

GEORGE C. GREENE,
Attorney for Plaintiff in Error.

109 In the Supreme Court of the United States.

HENRY C. SMITH, Relator and Defendant in Error,
vs.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Plaintiff in Error.

STATE OF MICHIGAN, } ss:
County of Lenawee, }

Clement E. Weaver, being duly sworn, deposes and says that on the 21st day of January, A. D. 1898, at the city of Adrian, in said county, he personally served upon Henry C. Smith, the relator named in the above entitled cause, by handing the same to him, at his office, in the city of Adrian, a notice, with a true copy of the assignment of errors thereto attached, of which notice and assignment of errors the foregoing are full and true copies.

CLEMENT E. WEAVER.

Sworn to and subscribed before me, at the city of Adrian aforesaid, this 22nd day of January, A. D. 1898.

D. B. MORGAN,
Notary Public.

110 [Endorsed:] U. S. Supreme Court. Henry C. Smith, relator & def't in error, *v.* Lake Shore & Michigan Southern Railway Co., respd. & pl'ff in error. Proof service notice filing record, docketing cause, &c., &c. Geo. C. Greene, att'y for pl'ff in error.

111 [Endorsed:] Case No. 16,778. Supreme Court U. S., October term, 1898. Term No., 227. The Lake Shore & Michigan Southern Railway Co., P. E., *vs.* Henry C. Smith. Statement of errors & direction by plaintiff in error that whole record be printed, with notice & proof of service. Filed Jan'y 26, 1898.

Endorsed on cover: Case No. 16,778. Michigan supreme court. Term No., 227. The Lake Shore & Michigan Southern Railway Company, plaintiff in error, *vs.* Henry C. Smith. Filed January 15th, 1898.